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SUPREME COURT OF THE UNITED STATES.

No. ~~297.~~ 74

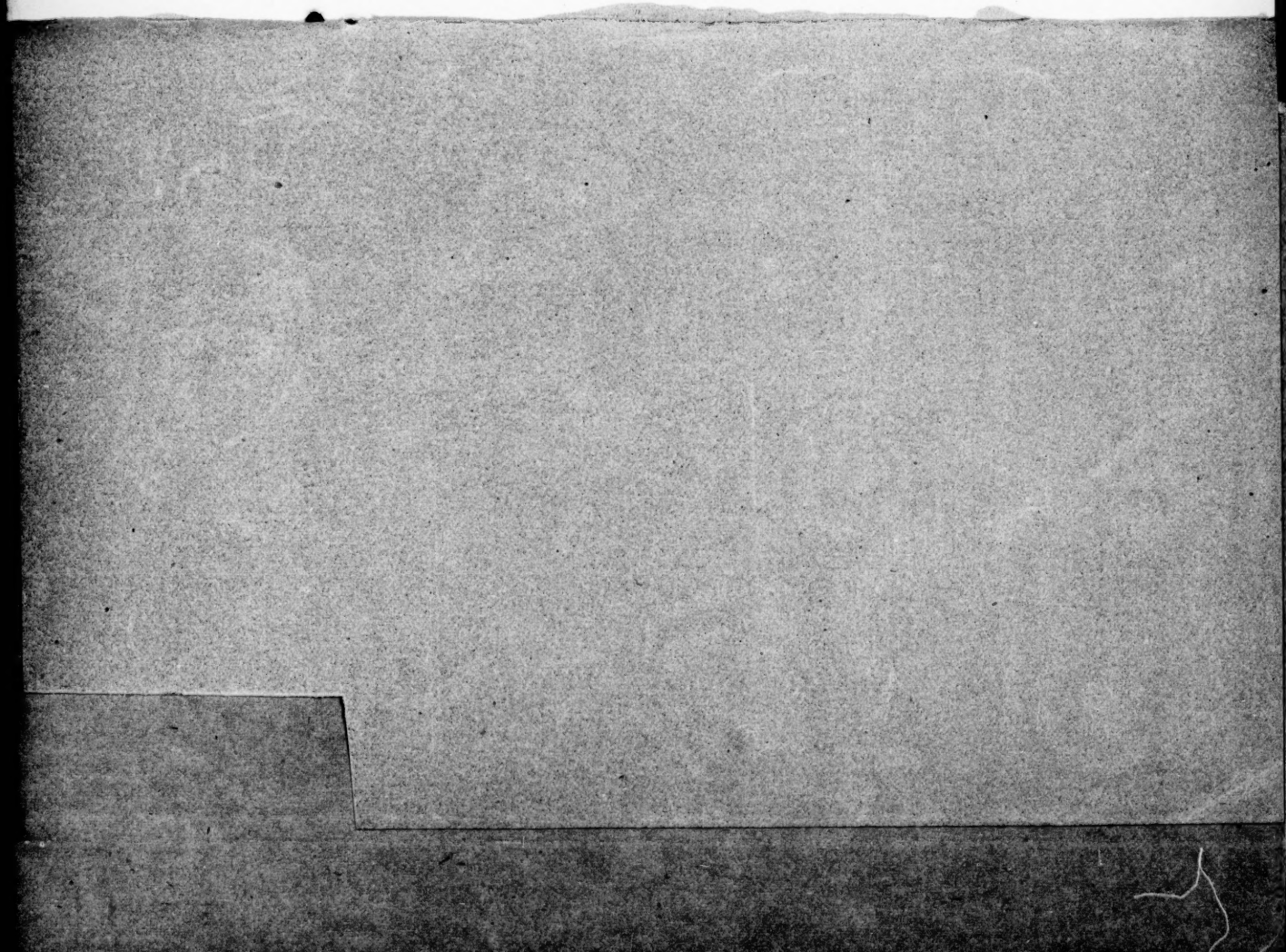
WILLIAM C. OATES, PLAINTIFF IN ERROR,

vs.

THE FIRST NATIONAL BANK OF MONTGOMERY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

FILED OCTOBER 27, 1876.



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1 *Organization of court.*

May Term, A. D. 1876.

At a circuit court of the United States for the fifth judicial circuit and middle district of Alabama, begun and holden at Montgomery, Alabama, on the first Monday of May, in the year of our Lord one thousand eight hundred and seventy-six, neither of the judges of said court being present, the court was adjourned by George Turner, esq'r, United States marshall until to-morrow at 12 o'clock.

TUESDAY, *May 2d, A. D.* 1876.

Neither of the judges being present, court was adjourned by George Turner, esq'r, United States marshall, under the following order, until Monday, the eighth day of May, A. D. 1876.

HUNTSVILLE, ALA., *April 29th,* 1876.

GEORGE TURNER,

U. S. Marshall Middle District of Alabama:

2 SIR: You will adjourn the circuit and district courts for the middle district of Alabama to Monday, the eighth day of May, 1876.

The grand jury may be discharged. This is done upon consultation with the district attorney.

JOHN BRUCE, *Judge.*

MAY 8TH, *A. D.* 1876.

The court met pursuant to adjournment. The honorable John Bruce, judge, presiding.

Summons & complaint.

Summons.

UNITED STATES OF AMERICA:

Circuit court of the United States for the middle district of Alabama.

The President of the United States of America to the marshall of said district, greeting:

You are hereby commanded to summon William C. Oates, who is a citizen of the State of Alabama, to appear before the Hon. circuit
3 court aforesaid at the place of holding said court, at Montgomery, on the first Monday of November next, to answer the complaint of The First National Bank of Montgomery, who are citizens of the State of Alabama, incorporated by that name under and by virtue of an act of the Congress of the United States, entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3rd, 1864, and the acts amendatory thereof and established, and having its place of business in said middle district of Alabama.

And have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the first Monday of May, A. D. 1875.

Issued the 23rd day of September, A. D. 1875.

Attest:

[SEAL.] J. W. DIMMICK,

Clerk U. S. Circuit Court, Mid. Dist. Ala.

Complaint.

UNITED STATES OF AMERICA:

In the circuit court of the United States for the middle district
4 of Alabama, November term, 1875.

Complaint.

THE FIRST NATIONAL BANK OF MONTGOMERY, plaintiff,
vs.
WILLIAM C. OATES, DEFENDANT.

The First National Bank of Montgomery, the plaintiff, who are citizens of the State of Alabama, incorporated by that name under and by virtue of an act of the Congress of the United States, entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3rd, 1864, and the acts amendatory thereof, and established and having its place of business in said middle district of Alabama, claims of the said William C. Oates, the defendant, who is a citizen of the State of Alabama, the sum of five thousand two hundred ($5,200.00) dollars due by promissory note made by him on the 25th day of July, 1873, and payable at office of Tallassee Factory, Montgomery, on the first day of December, after the date thereof, to the order of B. H. Micow, president, with interest thereon, which said note, with
5 interest thereon, is still due and unpaid, and is now the property of the plaintiff.

STONE & CLOPTON,
Att'ys for Pl'ff.

Service accepted.

I accept service of the within summons & complaint and waive copy. Oct. 2nd, 1875.

WM. C. OATES.

Def't's plea.

Pleas of defendant.

In U. S. circuit court. Fall term, A. D. 1875.

THE 1ST NATIONAL BANK OF MONTGOMERY
vs.
W. C. OATES.

In answer to the complaint comes the defendant and says, that the plaintiff ought not to recover against him because, he says:

1st. That he never promised in manner or form as in the complaint is alleged.

3. And for a further answer to said complaint the defendant says, that said promissory note given for stock in the Tallassee Manufacturing Company No. 1, payable to B. H. Micow, its president, the amount
6 of said stock so taken as the consideration of said note was $5,000.00.

4th. And for a further plea the defendant says, that said promissory note was given by defendant to one J. S. Byington as the agent of the Tallassee Manufacturing Company No. 1, a corporation under the laws of Alabama, for and in consideration of $5,000.00 of stock in said company, and with the understanding and agreement that the defendant might rescind the said contract for said stock at any time before or on the maturity of said promissory note. And defendant avers that on or before the maturity of said note, defendant tendered to said Tallassee Manufacturing Company No. 1 the certificates of said stock, and demanded the said note to be delivered up to him, and his tender and demand were refused. And defendant further avers that the said plaintiff received the said promissory note from the said company for collection as collateral security and without any valuable consideration therefor. And defendant further avers that said plaintiff is not a bona fide holder for value of the said promissory note, all of which def't is ready to verify, wherefore, &c.

WATTS & WATTS,
For Def't.

7 5. Same as the fourth plea, with the additional allegation, the facts set forth in the third plea.

WATTS & WATTS.

6. And for a further answer to the complaint defendant says, that the note sued on was given for five thousand dollars of stock in the Tallassee Manufacturing Company No. 1, a corporation under the laws of Alabama, and was made payable to B. H. Micow, the president of said company; that at the time of the taking of said stock and the giving of said note, one J. S. Byington, to whom the said note was given, and with whom the contract to take said stock was made, falsely and fraudulently represented to this defendant that said Tallassee Manufacturing Company No. 1 was in a solvent and prosperous condition, and did not owe exceeding $200,000 of debt, and was making large dividends out of its profits amongst its stockholders. Defendant relied on said representations, and on the faith of said representations, and being ignorant of the truth, this defendant was induced to take the said $5,000.00 stock in said company, and to execute and deliver to
8 said Byington, as the agent of said company, the said promissory note and to include therein $200.00 interest to accrue from the date of said note to the maturity thereof. And plaintiff further avers that at the time of giving and delivering said note to said Byington, it was understood and agreed between the said Byington as agent as aforesaid, and a written agreement was at said time entered into between defendant and said Byington, viz, on the 25th day of July, 1873, in substance as follows, viz:

Agreement of Byington & def't.

EUFAULA, *July 25th*, 1873.

Whereas Col. Wm. C. Oates has this day given me his note for fifty-two ($5,200) hundred dollars, payable December first proximo, to the order of B. H. Micow, president, for and in consideration of fifty shares Tallassee stock, viz, certificate No. 330: Now it is understood and agreed that Col. Wm. C. Oates has the option at that time of returning the above certificate of stock and receiving therefor the above described note, duly canceled.

(Signed) J. S. BYINGTON,
Special Agent Tallassee Factory.

And defendant further avers that on said representations and
9 on the agreement, and for no other consideration, the said promissory note was executed and delivered.

And defendant further avers that said representations so made by said Byington were false. That said Tallassee Manufacturing Company No. 1 was not in a solvent or prosperous condition, and it was indebted largely more than $200,000, viz, four hundred thousand dollars, or other large sum, and it was not making any dividends out of the profits of the said company, and the said company was, in fact, at that time, insolvent.

And defendant further avers that afterwards, viz, on the first day of December, 1873, and before the maturity of said note, the defendant offered to return, and did tender to said Tallassee Manufacturing Company No. 1, the said certificate of stock, and demanded the return of his said note canceled, and the said company refused.

And defendant further avers that the plaintiff obtained the said promissory note from the said Tallassee Manufacturing Co. No. 1 without any consideration therefor, and obtained the same for collection, as collateral security for an alleged indebtedness of the said company to said plaintiff, and for no other valid and legal consideration;
10 and defendant avers that the said alleged debt from said company to said plaintiff was usurious, a large amount, to wit, four thousand dollars, being for interest greater than the legal rate. And defendant avers that the said plaintiff is not a bona fide holder of said note for valuable consideration.

All of which the defendant is ready to verify, &c.

WATTS & HERBERT,
Et al., for Def't.

Leave to file pleas granted.

NOVEMBER 3RD, A. D. 1875.

THE FIRST NATIONAL BANK OF MONTGOMERY }
vs.
W. C. OATES. }

This day came the parties, by their attorneys, and, on motion of defendant, plaintiff consenting thereto, that the time of filing pleas be extended to Monday next, which motion, being understood by the court, is granted.

Demurrer interposed & decision reserved.

NOVEMBER 8TH, A. D. 1875.

FIRST NATIONAL BANK OF MONTGOMERY }
vs.
WM. C. OATES. }

This day came the parties, by attorneys, and demurrer being interposed to plea of defendant, argument was had and the decision reserved.

11 NOVEMBER 9TH, A. D. 1875.

FIRST NATIONAL BANK OF MONTGOMERY }
vs.
WILLIAM C. OATES. }

During the trial of this cause court adjourned until to-morrow morning at 10 o'clock.

Jury, and verdict for defendant.

NOVEMBER 10TH, A. D. 1875.

THE FIRST NATIONAL BANK OF MONTGOMERY }
vs.
WILLIAM C. OATES. }

This day came the parties, by attorney, and thereupon came a jury of twelve good and lawful men, to wit, J. D. Nixon and eleven others, who, being duly elected, tried, and sworn, well and truly to try the issue joined between the parties, on their oath do say that they find for the defendant.

It is therefore considered by the court that the defendant go hence, and that he recover from the plaintiff his reasonable costs in this behalf expended, for which execution may issue.

12 *Motion for new trial granted.*

DECEMBER 16TH, A. D. 1875.

THE FIRST NATIONAL BANK OF MONTGOMERY }
vs.
WILLIAM C. OATES. }

In this cause came the plaintiff, by attorney, and moves the court for a new trial on the following grounds:

1st. The verdict of the jury is contrary to the evidence.

2. The verdict of the jury is contrary to the charge of the court.

Which, after argument by counsel, and being understood by the court, said motion is granted. It is ordered that the judgment rendered at a former day of this term of the court be, and the same is hereby, set aside and held for naught.

May term, A. D. 1876.

MAY 24TH, A. D. 1876.

THE FIRST NATIONAL BANK OF MONTGOMERY }
vs.
WILLIAM C. OATES. }

13 This cause came on to be heard, the parties being present by attorneys, and during the trial of the cause the court adjourned until to-morrow morning at 10 o'clock.

MAY 25TH, A. D. 1876.

THE FIRST NATIONAL BANK OF MONTGOMERY }
vs.
WILLIAM C. OATES. }

During the trial of this cause the court adjourned until to-morrow morning, 10 o'clock.

Final judgement.

May term, A. D. 1876.

MAY 26TH, A. D. 1876.

THE FIRST NATIONAL BANK OF MONTGOMERY }
vs.
WILLIAM C. OATES. }

This day came the parties, by attorneys, and thereupon came a jury of twelve good and lawful men, to wit, W. J. Bibb and eleven others, who being elected, tried, and sworn well and truly to try the issue joined between the parties, on their oaths do say that they find for the plaintiff and assess his damages at six thousand two hundred and thirty-four dollars.

14 It is therefore considered by the court that the said plaintiff recover of the said defendant the said sum of six thousand two hundred and thirty four dollars, and the costs in this behalf expended, for which let execution issue.

Bill of exceptions.

THE UNITED STATES OF AMERICA:

United States circuit court for the middle district of Alabama, sitting at Montgomery, Alabama. May term, A. D. 1876.

FIRST NATIONAL BANK OF MONTGOMERY }
vs. } Bill of exceptions.
WILLIAM C. OATES. }

Be it remembered that on the trial of the above-stated cause, which was tried at the present of the court, the plaintiff introduced in evidence the note sued on described in the declaration, and also read the endorsement thereon, a blank endorsement made by B. H. Micow, president.

The plaintiff then rested.

15 The defendant then introduced testimony tending to prove that the note sued on was given to one J. S. Byington, the agent of the Tallassee Manufacturing Company No. 1, located and doing a manufacturing business in Elmore County, Alabama, and at the time of giving said note the said Byington made and delivered to defendant, and as part of the contract of taking said note, a written agreement, signed by said Byington, as special agent for said Tallassee Factory, which was a separate piece of paper from the note, and retained by the defendant in his possession, and was in the following words, viz:

Byington agreement.

EUFAULA, *July 25th*, 1873.

Whereas Col. Wm. C. Oates has this day given me his note for fifty-two ($5,200) hundred dollars, payable December first proximo, to the order of B. H. Micow, president, for and in consideration of fifty shares Tallassee stock, viz, certificate No. 330: Now it is understood and agreed that Col. Wm. C. Oates has the option at that time of returning the above certificate of stock, and receiving therefor the above-described note duly canceled.

(Signed) J. S. BYINGTON,
Special Agent Tallassee Factory.

16 The note sued on was in the following words, viz:

Note.

EUFAULA, ALA., *July 25th*, 1873.

$5,200.00.]

On the first of December next, for value received, I promise to pay to the order of B. H. Micow, president, five thousand two hundred dollars, payable at the office of Tallassee Factory, Montgomery.

WM. C. OATES.

And was endorsed as follows: B. H. Micow, pres.

The testimony tended to show that, at the time of taking said stock and the giving of said note, and as an inducement to said defendant to take said stock, the said Byington made fraudulent representations as to the solvency and amount of indebtedness, and the amount of dividends declared by said Tallassee Manufacturing Company No. 1, and the testimony showed that said defendant relied on said representations, and was induced thereby to take said stock, and to give his said promissory note, the one now sued on. The certificate of stock so delivered to defendant was introduced in evidence, and is in the following words:

17 *Certificate of stock.*

$5,000.00.

TALLASSEE MANUFACTURING COMPANY, NUMBER ONE.

No. 330.

Shares $100.00 each. Capital , with power to increase capital stock.

50 shares.

This is to certify that Wm. C. Oates is entitled to (50) fifty shares in the capital stock of the Tallassee Manufacturing Company No. 1, transferable only on the books of the company, in person or by attorney, on the surrender of this certificate.

Dated Tallassee, Ala., July 25th, 1873.

BENJ'N H. MICOW,
President.

(Signed) B. D. FRY, *Treasurer.*

There was no testimony tending to show that the said Tallassee Factory, Montgomery, was a bank or private banking house, but the testimony did show that said Tallassee Factory did, at the time said note was given and at the time of its maturity, have an office in Montgomery, Alabama.

The testimony tended to show that the defendant, before the 25th July, 1873, applied to Dr. W. O. Baldwin, the president of the plaintiff, and to C. J. Campbell, the cashier of plaintiff, to ascertain as to the stock of the Tallassee Manufacturing Co. No. 1, and that he was
18 informed by each of them that they thought the said stock was pretty good, but that the said Tallassee Manufacturing Company No. 1 was carrying too large an indebtedness, and was paying its officers too large salaries. The testimony on this point was somewhat conflicting.

The testimony further showed that the said Tallassee Manufacturing Company No. 1 was doing business with the plaintiff, and on or about the 4th day of November, 1873, the said B. H. Micow, president of said Manufacturing Company No. 1, applied to Dr. W. O. Baldwin, the president of plaintiff, to extend the indebtedness due by said manufacturing co. to said plaintiff, when there was about forty thousand dollars running to maturity during the month of November, 1873, and that Baldwin, president of plaintiff, required the said B. H. Micow to give collateral security for the extension of said indebtedness, and required the said Micow to pay for said extension, which was for 30, 60, 90, & 120 days. On the different classes of paper to be extended the payment of one and one-quarter per cent. per month for said extension. All which interest was paid at the time the extension was granted in advance, and
19 none of which was carried into the extension bills or paper.

This proposition was accepted by the said bank, and the extension granted, and the said Micow deposited with said bank, as collateral security, amongst other papers, the note of defendant, now sued on.

It was testified by said Micow that at the time of said agreement to extend, and before it was accepted by the plaintiff, he informed the officers of said bank, the plaintiff, that the note of defendant was given for stock in said Tallassee Manufacturing Company No. 1, and that all the papers so given to said plaintiff, as collateral security for said extension, was given for stock in said company.

The officers of said bank testified that no such information was given to them, and that they did not know what was the consideration of said note; but the president of the bank testified that he had reason to believe, but did not know, that said note was given for stock.

It was further proven that the defendant was, at the time of the date of said note, and before and after December, 1873, a stockholder and director of the plaintiff.

It was further proved that the defendant, on the first of De-
20 cember, 1873, tendered the said certificate of stock in said Tallassee Manufacturing Company No. 1 to the officers of said company, and demanded his said note, now sued on, with the purpose of rescinding the said contract under the agreement hereinbefore shown.

The defendant proved that the cashier of the plaintiff, on the 24th of November, 1873, wrote to the defendant a letter of the following purport and tenor, viz:

Plaintiff's letter to defendant.

THE FIRST NATIONAL BANK OF MONTG'Y, ALA.,
Nov'r 24, 1873.

Col. W. C. OATES, *Eufaula:*

DEAR SIR: We hold for collection, as collateral security from the Tallassee Manufacturing Co. No. 1, your note, due Dec'r 1st proximo, $5,200.00.

Truly, yours,

C. J. CAMPBELL, *Cashier.*

Which letter the defendant read in evidence.

The defendant proved that he, in response to said letter of Campbell, cashier, made the following reply, viz:

Letter of defendant to pl'ff.

"EUFAULA, ALA., *Nov'r 30th*, 1873.

DEAR MAJOR: Your favor informing me that my note for
21 $5,200.00, in favor of Tallassee Factory No. 1, had been turned over to the bank as a collateral, has been received. I enclose you a copy of the agreement under which I took the stock and gave the note. I also forward my certificate of stock by this mail to Mr. Micow. I wrote him about one week ago, stating my reasons for surrendering my stock and demanding the note.

I am, very truly,

W. C. OATES.

Instead of sending copy, I send original by Dr. T. Kimbrough.

Which letter was read in evidence by the defendant. The plaintiff, after having proved the handwriting and signature thereto, that it was written in reply to said letter written by defendant to the said C. J. Campbell, of date Nov'r. 30th, 1873, and that it was received by the defendant, and the defendant having previously proven that a few days afterwards he had a conversation with said Baldwin on the subject-matter of said letter, offered to read as evidence a letter written by Dr. W. O. Baldwin, the president of the plaintiff, addressed to the defendant, which is in the following words, viz:

22 *Baldwin's letter to def't.*

THE FIRST NATIONAL BANK OF MONTGOMERY,
Montgomery, Ala., Dec'r 1st, 1873.

W. C. OATES, Esqr.:

MY DEAR COL.: Your letter of 30th ult., with enclosed, has just been handed me by Dr. Kimbrough. I presume you must have overlooked the fact that the note signed by you for $5,200.00, which we received from Mr. Micow and now hold, as a negotiable paper, payable to order, office of Tallassee Factory, Montgomery, properly endorsed, and for which we paid a valuable consideration. If it occasions you any embarrassment, I shall regret very much our having anything to do with the paper, but having no notice of a private understanding between you and Mr. Micow, through his agent, and finding the paper in form and otherwise satisfactory, we of course had no hesitation in trading for it.

If it were possible for me to accommodate your views and wishes in relation to the matter, without prejudice to the bank, I would most gladly do so, but under present circumstances I do not think that probable. This note is due to-day, but being entitled to grace, will not go to protest for non payment before the 4 inst. Mr. Micow has made no provis-
23 ion for its payment, and, having gone to New York, I am sure will not. If you desire it should be withheld from protest, you can write me in time to prevent it.

I am, very truly, & respectfully, your ob't serv't,

W. O. BALDWIN, *Pres.*

Dr. Baldwin was present in court as a witness to the introduction of this letter as evidence. The defendant objected, but his objections was overruled, and the defendant excepted to this ruling of the court, and the said letter was thereupon read to the jury as evidence against the objection and exception of the defendant.

The testimony tended to show that the indebtedness of said Tallassee Manufacturing Company No. 1 to the plaintiff before the 4th of November, 1873, had been extended on several occasions at usurious interest, but such interest was invariably paid in advance.

The testimony further showed that Eufaula was a town in Alabama, about 80 miles from Montgomery, where the plaintiff was located, connected with it by railroad and a telegraph line, and that the de-
24 fendant resided at Eufaula, and that no enquiry was made of him, the defendant, by the officers of the plaintiff before receiving his note as collateral security as to any defence to it.

The plaintiff proved, by the cashier of the plaintiff, that the contract and agreement under and by which said note sued upon was transferred to the plaintiffs was correctly entered by him and in his handwriting at the time upon the minute-book of the plaintiff, and that it was the only written evidence of said contract; and the plaintiff also proved by said Micow, who was a witness introduced by defendant, that said entry in said minute-book was a true and correct statement of said contract, and proved that the extension was, in fact, given by plaintiff according to said agreement. The plaintiff read in evidence the said entry of said contract in said minute-book against the objections of the defendant, which was as follows:

25 *Meeting of bank committee.*

FIRST NATIONAL BANK OF MONTGOMERY,
Montgomery, Ala., Nov'r 5th, 1873.

A meeting of a bill committee, consisting of directors Blum, Clopton, and Munter, was called this day by the president, who stated the object of the meeting to be the consideration of a proposal from B. H. Micow, president, for the extension of the paper of the Tallassee Manufacturing Co., which had been discounted by the bank. This proposition is as follows:

Woodward, Baldwin & Co., acceptance due Nov'r 9th, $2,489.75; extended 30 days.

Woodward, Baldwin & Co., acceptance due 16th Nov'r, $3,800.00, to be extended 60 days.

No collaterals to be furnished.

L. Hill's acceptance, due Nov'r 17th, $3,000.00; pay $1,000.00; extend balance 30 and 60 days.

L. Hill's acceptance Nov'r 20th, $3,123.43; pay $1,123.43; extend balance 30 and 60 days.

L. Hill's acceptance, due Nov'r 22, $3,100.00; pay $1,100.00; extend balance 30 and 60 days.

Deposit $6,000.00 collaterals against these.

26 Warehouse Co., bill $6,475.35, due Nov'r 6th; renew at 30, 60, & 90 days.

Calculate to pay at maturity of renewals.

Acceptance, B. H. Micow, pres't, $5,112.47; renew at 60, 90, & 120 days.
" " " " $4,013.27; " " " " " "

Deposit $9,000.00 collateral for these.

B. H. Micow' acceptance, $5,863.20, due Nov'r 9th, now secured by 46 B. C., for which propose to give Lehman, Abraham & Co.'s acceptance 60 days, and have cotton released.

Cotton bills, Nov'r 15th, $3,267.94, secured by 35 B. C., a $50, $1,750. Nov'r 23, $7,196.09, secured by 80 B. C. at $50, $4,000.00.

Cotton bills, Nov'r 30th, $3,772.22, secured by 39 B. C. at $50, $1,950.00; $1,000.00 has been paid on this bill.

Nov'r 30th, $14,236.25, less $1,000.00—$13,236.25; propose to deposit collaterals equal to $6,000.00 in addition to the cotton, and have bills extended as required; expect to pay all these within 60 days.

With this proposition Mr. Micow offered a list of securities from which the committee might select such as in their judgment were safest for the bank.

27 After a careful consideration of the proposition it was—

Resolved, That the cashier be instructed to inform Mr. Micow that the proposal will be accepted, providing he deposit as collateral security notes, acceptances, &c., as follows, viz: Note of W. C. Oates, $5,200.00; 2 notes of S. W. Harris, $15,000.00, less credits, $8,225.91—$6,774.09; note W. J. Howard, $675.00, 52 Mont. Co. bonds, $5,200.00, est. at $50—$2,600.00; acceptance of Epping, Bellas & Co., $1,250.00; note of Dr. J. S. Eve, Augusta, Ga., $5,000.00; note of Judge Goldthwaite, $12,557.33, less credits, $6,000.00, secured by certificates for 100 shares stock Tallassee Manufacturing Co.

On motion the meeting adjourned.

(Signed) C. J. CAMPBELL,
Cashier.

(NOTE.—B. H. Micow, pres't, accepted proposition of bill committee, and transfered the collaterals specified with the exception of the 52 Montgomery Co. bonds, in lieu of which he offered note of W. B. Hall, endorsed by W. A. Thomas, $4,666.64, which was accepted by consent of president & committee.)

To the introduction of this resolution as evidence the defendant objected, but his objection was overruled by the court and the defendant excepted.

28 The plaintiff further proved that at the time said contract was made, said extension granted, and the note sued upon was transfered to the plaintiff, none of the officers had any notice of any defect in or defence to said note or of any equities between the parties to said note, and there was no notice thereof, except what may be implied from the facts herein set forth.

On the trial of the case there was no evidence as to the powers of the Tallassee Manufacturing Company No. 1 to sell its stock on a credit, nor was there any evidence introduced showing the power of its president to endorse and trade or pledge promissory notes or other paper belonging to it, nor was there any evidence that it was a corporation other than what is implied from the facts herein stated.

The testimony showed that the Tallassee Manufacturing Co. No. 1 had suspended payment of its debts in December, 1873, or in January, 1874, and had made an assignment to trustees for the payment of its
29 debts, and that there is a suit now pending, in which a receiver of its assets has been appointed by a chancery court to wind up its affairs.

The testimony showed that the said Tallapoosa Manufacturing Co. No. 1 had its paper protested for non-payment in September, 1873, and that this fact was known to the plaintiff at the time of its occurrence; but it was shown that the paper protested in September was, soon thereafter, paid or otherwise settled, which was also known to plaintiff.

The said Micow testified that at the time said Micow president, made application for the extension, in November, 1873, he made known to president of plaintiff that he had no other paper with which to give the collateral security required for the extension asked for, except notes given for stock in it. Said Micow also testified that at the time of said extension, he, as president of said Tallassee Manufacturing Co. No. 1, was struggling with a heavy load of indebtedness, and that he then thought that by getting the extension he would be able to pay out, and he had, at the time of testifying, believed but for the
30 financial panic he would have done so.

The foregoing was in substance the whole of the testimony in the case.

The revised code of Alabama and the statute laws of the State of Alabama were then read to the court and relied on.

On this evidence, the court, amongst other things, charged the jury: "I instruct you as matter of law, that if the indebtedness of the Tallassee Manufacturing Company to the bank upon which this note in suit was taken, was, in part or in whole, based upon a valid and legal consideration, then the transfer of the note to the bank was based on a valid contract. The contract was not such as to violate the security taken on it.

To this charge the defendant excepted.

The defendant asked the court to give the following written charges, viz:

1st. That a contract to extend a past debt on the payment of usurious interest for the extension is illegal and void under the laws of Alabama, and under the laws of Congress.

2. That the reception of the note by the plaintiff on a contract with the Tallassee Manufacturing Company No. 1 to extend its indebtedness to the bank, on an agreement to pay one per cent. per month
31 interest does not make the plaintiff such a bona-fide holder as will prevent the defendant from setting up a valid defense to the note sued on, if the jury so find the facts.

3. That if the jury find from the evidence that the note now sued on was given for stock in the Tallassee Manufacturing Company No. 1, and the defendant, at the time of making said note, reserved the right of rescinding the contract and of having his note delivered up canceled, by delivering the certificate of stock given for said note at the maturity of said note, and the defendant did, on the day of the maturity of the

note, tender to the payee of the note the certificate of stock, and demand his note with the purpose of rescinding the contract, then the plaintiff cannot recover on this note, although it received the note from the payee, before its maturity, if the plaintiff received said note as collateral security for a past debt, due to it by the Tallassee Manufacturing Company No. 1, and agreed to extend said indebtedness, on the payment of more than eight per cent. per annum interest for said extension.

32 4th. If the jury find from the evidence that the plaintiff, at the time it took the note sued on, had notice that it was given for stock in the Tallassee Manufacturing Company No. 1, and that notice of facts and circumstances from which it ought reasonably to have presumed that defendant had been induced to make, and had made, said subscription on account of false and fraudulent representations made to him by said Manufacturing Company, or its agents, as to the condition, liabilities, and assets of said Manufacturing Company, then the plaintiff is charged with notice of all such facts as it could have learned by inquiry of defendant, and is not such a bona fide holder of the note as to preclude the defendant from setting up any defense that would be available to him if sued by the Manufacturing Company.

5th. That if the jury find from the evidence that the note sued on was given and intended to be given to the Tallasse Manufacturing Company No. 1, through its president, for stock in said company, then unless it is shown that said Tallassee Manufacturing Company No. 1 had the right to sell its stock on a credit, the note given for said

33 stock is void, and no recovery can be had on it by the plaintiff, if the proof shows that the plaintiff, through its officers, had notice that said note was given for stock in said Manufacturing Company at and before the plaintiffs received it from the payee, and on this state of facts the verdict must be for the defendant.

6th. If the plaintiff's only title to the note sued on was obtained by taking it as collateral security for the payment of past indebtedness extended on a usurious consideration for the transfer to it of the said note and of other securities at the same time, and if defendant had reserved the right to surrender to the payee of said note his certificate of stock on the day the note fell due and to demand and receive the said note, and if defendant did make a tender of said certificate of stock and demand his note on the day it fell due in the manner and form as required by his contract, the jury must find for the defendant.

7th. If the jury find from the evidence that the plaintiff having a claim against the Tallassee Manufacturing Company No. 1 for moneys advanced at a usurious rate of interest, in order to secure payment of such indebtedness, agreed with said Tallassee Manufacturing Co.

34 No. 1 to take the note sued on as collateral security, and at the same time to further extend the time for the payment of said indebtedness, and charged at the same time a usurious rate of interest on such extension, receiving such note as collateral to such usurious indebtedness so usuriously extended, this would not constitute plaintiff such a holder as would prevent defendant from setting up any defence said note was subject to in the hands of said Manufacturing Company.

8th. That under the laws of Alabama the fact that the promissory note now sued on is made payable at a designated place does not prevent the defendant from making any valid defence allowed by section eighteen hundred and thirty-nine (1839) of the revised code of Alabama he had to it in the hands of the payee before notice of the transfer to plaintiff. And if the jury find from the evidence that the defendant at the time of

making the note reserved the right to rescind the contract by delivering up the certificate of stock for which the note was given, and having his note returned canceled at the maturity of the note, then if the
35 jury further find from the evidence that on the day of the maturity of the note the defendant through his agent tendered the certificate of stock to the Tallassee Manufacturing Company No. 1 and demanded his note, then the verdict must be for the defendant.

9th. That if the officers of the bank at the time it traded for the note had notice of such facts and circumstances as would have induced a prudent man to make further inquiry, will authorize the jury to impute to the bank notice of all that it could have ascertained by due inquiry, and if the officers of the bank refrained from making inquiry with the view of avoiding knowledge, then such failure would be evidence of bad faith.

Each one of the foregoing charges numbered from one to nine inclusive was asked separately, and the court refused to give either of the said charges, and the defendant separately excepted to each of said refusals of the court.

36 In the general charge given by the court to the jury the court said:

The next point in the defence is that under the provisions of the revised code of Alabama the note sued on is not commercial paper, and that it is subject to all payments, set offs, and discounts had or possessed against the same previous to notice of the assignment or transfer.

This renders an examination of the act of the legislature of Alabama, of April 8th, 1873, to see what change that act has wrought upon the law of Alabama upon this subject. This act has placed the notes payable in money at a designated place upon the same footing as bills of exchange and promissory notes payable in money at a bank or private banking house. That is to say, all paper of the classes named are governed by the commercial law. Now what does this signify? Nothing less than that the class of paper named is to be governed by the commercial law as known in Alabama, as known in the United States, and as known throughout the commercial world. It was, so to speak,
37 to lift this class of paper from under the limitations of the previous legislature of the State, and place it upon the higher ground of the commercial law.

The history of the legislation upon this subject in Alabama shows that this has been the tendency of the legislation, and the question is, has that been accomplished? That it was the intention of the legislature to so accomplish that result by the acts of April 8th, 1873, seems to me to admit of but little doubt.

But the question is, has section 1839 been repealed or amended, or is it not the law of Alabama now? It is not claimed that it has been expressly repealed or amended, and it is a correct proposition of law that repeals by implication are not favored. Yet the proposition of law remains good that statutes may be amended and may be repealed by necessary implication. It is said that section 2, article 4, of the constitution of Alabama, in force when this transaction occurred, discloses that "each law shall contain but one subject, which shall be clearly expressed in its title," and no law shall be revised or amended unless the new act contain the entire act revised, or the section or sections
38 amended, and the section or sections amended shall be repealed.

It is said that these statutes, conflicting though they be, can stand together, and if by interpretation that can be done and a field of operation found for both statutes, that must be done. This is true; but

the field of operation must be a natural and reasonable one, with a view to the evident intention of the legislature in passing the subsequent law. Did the legislature intend the act of April 8th, 1873, to affect notes payable in money at a designated place only as to days of grace, presentment, and notice of dishonor? I think not. That is to my mind a cramped, strained, and unreasonable construction of the statute. We must presume that the legislature knew of the rules and principals of the commercial law. If it is saying too much to say they must have known the effect of the negotiation of such paper before maturity upon defenses and equities between original parties by the rules and principals of the commercial law, and to say that the statute of April 8th, A. D. 1873, means no more than that paper of this class shall be
39 governed by the commercial law only as to the days of grace, protest, and notice, is to my mind unreasonable, unnatural, and a misapplication of the principle or rule of law here invoked.

If by necessary implication amends section 1839, and adds to the exceptions named in it promissory notes payable in money at a designated place. If I am correct in these views, it follows as a matter of law, and I so instruct the jury, that this paper sued on is by the laws of Alabama commercial paper. If this is commercial paper, and if the plaintiff became the holder thereof before its maturity for a valuable consideration, then, however good the defence may be which the defendant has against the Tallassee Manufacturing Company No. 1, they are not good against the plaintiff unless at the time the bank took this paper it thought its officers had notice that Oates, the defendant, had a defence to the note.

To this general charge the defendant excepted, so far as it is declared the defenses allowed in section 1839 of the revised code of Alabama were cut off by the act of 8th of April, A. D. 1873, as to notes payable in money at a designated place.

At the request of the plaintiff, the court gave the following written charge *charge*, viz:

40 "If the jury believe from the evidence that the note sued on was acquired by the bank under and by virtue of the agreement, as stated on the minute-book of the bank read in evidence, then the bank is a bona-fide holder for a valuable consideration; and if the jury further believe from the evidence that the bank at the time it acquired the note had no notice of any defect in or defence to said note, and was not guilty of bad faith in taking said note at the time it was taken, then the jury must find for the plaintiff, although more than legal interest may have been paid.

To the giving of this charge the defendant excepted, and this is signed as a bill of exceptions in term time, July 10th, 1876.

JOHN BRUCE, *Judge.*

Filed in office 22 August, A. D. 1876.

J. W. DIMMICK, *Clerk.*

41 *Writ of error.*

UNITED STATES OF AMERICA:

The President of the United States to the honorable the judge of the circuit court of the United States for the middle district of Alabama, greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea, which is in the said circuit court before you, be-

tween the First National Bank of Montgomery, plaintiff, and William C. Oates, defendant, a manifest error hath happened to the great damage of the said William C. Oates, defendant, as by the complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you if a judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next,
42 in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court, the 15*nd* day of September, A. D. 1876.

[L.S.] J. W. DIMMICK,
Clerk of the U. S. Circuit Court, Middle District of Alabama.

Allowed by—

JOHN BRUCE, *Judge.*

Filed in office the 15th day of Sept., A. D. 1876.
J. W. DIMMICK, *Clerk.*

Notice of appeal.

The United States of America to the First National Bank of Montgomery, or to Messrs. Stone & Clopton, attorneys of record for the First National Bank of Montgomery, greeting:
43 You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the middle district of Alabama, wherein William C. Oates is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgement rendered against the said plaintiff in error, as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States this 15th day of September, A. D. 1876.

[L. S.] J. W. DIMMICK,
Clerk U. S. Circuit Court, Mid. Dist. Alabama.

Received in office this 15th day of Sept., 1876, and on the same day executed by delivering a copy to David Clopton, esqr.

GEORGE TURNER,
U. S. Marshal.

44 *Appeal bond.*

Know all men by these presents, that we, William C. Oates as principal and James W. Oates as surety, are held and firmly bound unto The First National Bank of Montgomery, in the full and just sum of

twelve thousand four hundred and sixty-eight dollars, to be paid to the said The First National Bank of Montgomery, its certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 8th day of July, A. D. 1876.

Whereas lately, at a circuit court of the United States for the middle district of Alabama, in a suit depending in said court between the First National Bank of Montgomery as plaintiff, and said William C. Oates as defendant, a judgment was rendered at the May term, A. D. 1876, of said court in favor of said First National Bank of Montgomery, against the said William C. Oates for the sum of six thousand two hundred and thirty-four dollars, and the said William C. Oates having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgement in the aforesaid suit, and a citation directed to the said The First National Bank of Montgomery, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next:

Now the condition of the above obligation is such that if the said William C. Oates shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else remain in full force and virtue.

WILLIAM C. OATES. [L. S.]
JAMES W. OATES. [L. S.]

Sealed & delivered in presence of—
J. W. FOSTER.

Approved by—

JOHN BRUCE,
Judge.

Filed 15th day of September, A. D. 1876.

J. W. DIMMICK,
Clerk.

UNITED STATES OF AMERICA,
Middle District of Alabama, ss:

I, J. W. Dimmick, clerk of the circuit court of the United States for the middle district of Alabama, do hereby certify the foregoing pages, numbered from one to forty-five, contain a full, true, and correct transcript of all the original papers, dockets, and minutes in the case of the First National Bank of Montgomery against William C. Oates, as the same appears of record and on file in my office as such clerk.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed at Montgomery, in said district, this 4th day of October, A. D. 1876.

[SEAL.]

J. W. DIMMICK,
Clerk of the Circuit Court of the United States for the Middle District of Alabama.

(Indorsement on cover:) No. 297. William C. Oates, plaintiff in error, vs. The First National Bank of Montgomery. M. Alabama C. C. U. S. Filed 27th October, 1876.

REC. 297—2

In Supreme Court of United States.

OCTOBER TERM, 1879.

WILLIAM C. OATES, PLAINTIFF IN ERROR,

No. 74.] VS.

THE FIRST NATIONAL BANK OF MONTGOMERY.

DEFENDANT IN ERROR.

ARGUMENT FOR PLAINTIFF IN ERROR,

—BY—

WM. C. OATES AND HILARY A. HERBERT.

BARRETT & BROWN, PRINTERS.

In Supreme Court of United States.

OCTOBER TERM, 1879.

WILLIAM C. OATES, PLAINTIFF IN ERROR,

No. 74.] VS.

THE FIRST NATIONAL BANK OF MONTGOMERY.

Error to the Circuit Court of the United States for the Middle District of Alabama.

The defendant in error, The First National Bank of Montgomery, brought suit against William C. Oates, the plaintiff in error, in the said Circuit Court, in October, 1875, upon a promissory note in the following words:

"$5,200 00 EUFAULA, ALA., July 25th, 1873.

On the first day of December next, for value received, I promise to pay to the order of B. H. Micou, President, five thousand two hundred dollars, payable at the office of Tallassee Factory, Montgomery.

WM. C. OATES."

On 10th November, 1875, a trial was had and resulted in a verdict for the defendant in the court below. On December 16th that verdict was set aside and new trial granted. At May term, May 24th, 1876, another trial was had, which resulted in a verdict and judgment in favor of the Bank for $6,234 00, from which Oates appeals to this court.

The only consideration for said note was fifty shares of stock, of one hundred dollars each, in the Tallassee Manufacturing Company No. 1, a corporation located in Elmore county, Alabama. Contemporaneously with the making of

said note and as a part of the contract, the special agent for the company executed and delivered to Oates a written instrument in these words, to-wit:

"EUFAULA, July 25th, 1873.

Whereas, Col. Wm. C. Oates has this day given me his note for fifty two ($5,200) hundred dollars, payable December first proximo, to the order of B. H. Micou, President, for and in consideration of fifty shares Tallassee stock, viz.: Certificate No. 330. Now it is understood and agreed that Col. Wm. C. Oates has the option, at that time, of returning the above certificate of stock, and receiving therefor the above described note duly canceled.

J. S. BYINGTON,
Special Agent Tallassee Factory."

Said special agent Byington falsely and fraudulently represented to Oates that said Tallassee Factory was not indebted above two hundred thousand dollars, and was earning and paying large dividends to its stockholders semi-annually, and by these representations induced him to give his said note for stock therein; when in fact said Tallassee Factory was indebted over a half a million of dollars, and was not earning any dividends to its stockholders, and was utterly insolvent. About the close of said year the company made an assignment for the benefit of its creditors.

On the 1st day of December, 1873, Oates, through his agent, tendered to said Tallassee Manufacturing Company No. 1, through its President, B. H. Micou, at the office of the company in Montgomery, the said certificate of stock No. 330, and demanded that his said note be canceled and delivered to him, and that said contract be in all things rescinded, in accordance with the right reserved to him by said written agreement. The demand was refused, for the reason that said B. H. Micou had previously, to-wit: on the 5th day of November, transferred the note to said Bank. A short time before said note was made by the plaintiff in error he, being one of the Directors of the Bank, and on intimate business relations with the president and cashier, and knowing that the said Tallassee Manufacturing Company transacted a large amount of business with the Bank, consulted them upon the propriety of taking stock therein, and obtained their opinions concerning said stock.

In September, 1873, the paper of said Tallassee Factory went to protest, of which fact the Bank had notice. On the 4th day of November, 1873, when there was about forty thousand dollars of indebtedness of the said Factory to the Bank, running to maturity during that month, B. H. Micou, the president, applied to the president of the Bank, for an extension of the time of payment, for 30, 60, 90 and 120 days. The Bank, through its president replied, pay one and one-quarter per cent. per month, and furnish collateral security and the request for extension will be granted. The president of the manufacturing company furnished the collaterals, among which was the said note of Oates, and paid the one and one-quarter per cent. per month upon said indebtedness in advance, according to the demand of the Bank, which, however, "*was not carried into the extension bills or paper.*" The evidences tended to show that the president of the Bank knew at the time it received said note that it was given for stock in said manufacturing company. Micou *testified that he told Baldwin so*, and Dr. Baldwin testified that while he did not know it, he had reason to believe that said note was given for stock in said company. Oates was, at the time his note was placed with the Bank, a stockholder and director therein, residing at Eufaula, a town eighty miles distant from Montgomery and connected therewith by a railroad and telegraph line, but no inquiry was made of him, by any representative of the Bank, as to whether said note was a legal liability, nor was any notice given him of the transfer of said note until he received the letter of Campbell, the cashier, on 30th November. The officers of the Bank testified that, at the time said note was received, none of them knew of any defect in, or defense to said note, "except what may be implied from the facts set forth" in the bill of exceptions.

There was no evidence before the court that said Tallassee Manufacturing Company had any power to sell its stock on a credit, nor to show that its president had any power or authority to indorse, trade, or pledge promissory notes belonging to it, nor was there any evidence that it was a bank

or private banking house, but it was shown and admitted that it had an office in Montgomery.

1. There is no question as to the perfectness of the defense of the maker of the note as against the payee. That is admitted. It was an act of gross injustice and fraud, in the Tallassee Manufacturing Company No. 1, through its president, to put the note of plaintiff in error in circulation. The question presented at the very threshold of this case is did the Bank take the note in the usual or ordinary course of trade and business, for a valuable consideration, without notice of the equities of the maker? When the Bank received it no part of the indebtedness of the manufacturing company to the Bank was due, and none of the bills or evidences of the debt were surrendered to the manufacturing company. The extension of time of payment, for 30, 60, 90 and 120 days may have been a sufficient consideration for the transfer as between it and the Bank; but was that such a consideration as constituted the latter a purchaser in the usual course of trade?—Wardell v. Howell, 9 Wend. R. 170; 3 Edw. 182; Bright v. Judson, 47 Barb. R. 28; 37 Barb. R. 458.

2. The rule is admitted that the purchaser *bona fide* for value, in the usual course of trade, of a negotiable note or bill, before its maturity, and without notice of defenses, takes it unaffected by any equities between the antecedent parties. In the case at bar, it is insisted by the Bank, that it is such a holder of the note of plaintiff in error, and that the note is such an instrument, and that the maker is precluded from urging his defenses against it.

The Tallassee Manufacturing Company, through its president, applied to the Bank for an extension of the time of payment of its indebtedness to the latter. The Bank, through its president, replied, pay one and one quarter per cent. thereon, per month, and furnish collateral security, and the extension requested will be granted. The president of the Manufacturing Company, furnished the collaterals, among which was the said note, and paid the usurious interest demanded, and the extension was granted.

The contract was therefore an entire one.

Story on Contracts, Sections 21-22, (3d ed).

T. Kirkland v. Oates, 25 Ala. R. 465.

Batre v. Simpson, 4 Ala. R. 305.

The usurious interest paid was an illegal element of the contract, by which the Bank acquired the note.

See Sections 1827-1831 Revised Code of Alabama; and Sections 5197-5198, Rev. Statutes United States.

These Statutes forbid the taking, receiving, or reserving of more than eight per cent. per annum, for the loan, or forbearance of money, goods, or things in action; and the violation of these Statutes makes void the contract for the whole interest.

1 Brickell's Alabama Digest, p. 124 et seq.

F. and M. National Bank v. Dearing, 1 Otto, 20.

Demanding and receiving usury was a part of the contract by which the Bank obtained the note. Can it be said that this part of the agreement was not in violation of law? The extension, without the usury, would have been legal, but the contract was entire, and the legal and illegal parts of it are inseparable.

1 Parsons on Contracts, p. 380.

Story on Contracts, Sections 459-569.

Wynne v. Whisenant, 37 Ala. R. 46.

It was the furnishing collateral security, and payment of the usury taken together, that induced the Bank to grant the extension.

The plaintiff in error admits that the plea of usury is a personal privilege, to be exercised by the promisor, at his discretion. He does not insist that he can set up that defense, for the Tallassee Factory, in the adjustment of its indebtedness to the Bank. That could be done only by the Factory. But he does insist that the Bank is not a *bona fide* holder, or purchaser, when it acquired the note through, or by a contract tainted with usury, and in violation of law. Even a mortgage is not a valid security as to usury.

Pearson v. Baily, 23 Ala. R. 537.

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The Tallassee Manufacturing Company, through its president, applied to the Bank for an extension of the time of payment of its indebtedness to the latter. The Bank, through its president, replied, pay one and one quarter per cent. thereon, per month, and furnish collateral security, and the extension requested will be granted. The president of the Manufacturing Company, furnished the collaterals, among which was the said note, and paid the usurious interest demanded, and the extension was granted.

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Pearson v. Baily, 23 Ala. R. 537.

While the Statutes cited do not visit upon the violator of them, the heavy penalty of a forfeiture of the debt, they make it unlawful to contract for, or take usury. The measure of punishment prescribed by theses Statutes, does not affect the question of illegality. A violation of Statutes against usury, attended by a forfeiture of the entire interest only, as a penalty, is no less a violation of law than if the penalty was forfeiture of the whole debt; for it is not necessary that a Statute should impose a penalty for its violation, in order to make a contract which is opposed to its operation, void. Its policy may be violated, though it contain no prohibitory terms, or is silent as to the consequence of a violation.

McGehee v. Lindsay, 6 Ala. R. 21.
Trammell v. Gordon, 11 Ala. R. 656.
Shippy v. Eastwood, 9 Ala. R. 198.
Woods & Co., v. Armstrong, 54 Ala. R. 150.
Milne & Co. v. Haber, 3 McLean, 212.
That the contract was illegal for the usury taken.
See Bank United States v. Owens, 2 Peters, 527.
Hall v. Earnest, 36 Barb. R. 585.

"Actions speak louder than words," is a trite but true saying. If the contract was an innocent one, if there was no violation of law, why was the entry, in the minute-book of the bank, full and specific in stating every particular of the contract, except the one and one quarter per cent. per month, which the President of the Manufacturing Company had to pay to obtain the extension? Why was the minute-book of the Bank silent as to that part of the contract? There is but one answer; *i. e.* because it was in violation of law. Did the Bank fail to keep any record of that transaction? Or was that business kept upon a private book which would not stand the scrutiny of judicial inspection? It "was not carried forward into the extension bills or paper." Why not? Because it would look ugly—it was a violation of law—it ren-

dered the Bank liable to pay as a penalty, double the amount thus unlawfully taken. Why was the one and one quarter per cent per month required to be paid in advance? The usury was invariably paid in advance on prior extensions,—(see page 10 of the Record)—and why was this? Because the Bank preferred the risk of a suit for the penalty prescribed by Section 5198 Rev. Statutes, to leaving its securities contaminated by an unlawful reservation of interest within them? Why violate the law, or take any risk of that sort? The answer is found in that inordinate thirst for fortune which cannot await legitimate profits—that greed of gain which begets recklessness of venture—that mammon worship, which culminates in lawlessness, and in these modern times calls so loudly for the exercise of the reformatory powers and salutary restraints of a pure judiciary and a rigorous enforcement of the law.

How can the Bank be a *bona fide* holder, in the usual course of trade, when it acquired the note on a usurious contract? There is a solecism on the face of the expression, "a *bona fide* purchaser on usury," says the Supreme Court of New York.

Ramsdell & Brown v. Morgan, 16 Wend. R. 574.

The Supreme Court of Alabama has decided, repeatedly, that the purchaser, of a negotiable paper on a usurious contract, is not a *bona fide* purchaser, and that the equities of the maker against the payee are available against the paper in the hands of such a purchaser.

Saltmarsh v. Tuthill, 13 Ala. R. 390.

Carlisle v. Hill, 16 Ala. R. on p. 405.

Hunt, Frowner, *et al.* v. Acre & Johnson, 28 Ala. R., p. 596.

In this last named case and in Woods & Co., v. Armstrong, 54 Ala. the case of Saltmarsh v. Tuthill, 13 Ala. is cited and approved.

See, also, Cram v. Hendricks, 7 Wend. R. 573.

Gaither v. F. and M. Bank, 1 Peters R. 37.

Floyd v. Scott, 4 Peters, 205; 5 Taunt. 780.

Dean v. Howell, Hill and D. Supp. N. Y. R. 39.

Kentgen v. Parks, 2 Sandford R. (Sup. Ct.) N. Y. 60.

3. The Bank could not be a *bona fide* holder, because it received the note as an indemnity, or collateral security, for an antecedent indebtedness of the Manufacturing Company, to the Bank.

See Campbell's letter, p. 9 of Record.

One who takes paper, or other thing, as collateral security, is not a purchaser of the paper or thing. It is true that a mortgagee, who parts with something valuable, at the time of taking the mortgage, is considered a purchaser for value, and is protected; but the taking of collateral security is a different thing The principal contract represents the purchase, while the collateral is outside the purchase.

Wells v. Morrow, 38 Ala. R. 4th point on p. 128.

In order that commercial paper shall be protected in the hands of a transferee, against the equities of the maker, it must appear that he took the paper before maturity in the usual course of trade. It is not the usual course of trade to take a paper, or other thing, as collateral security. He must be the absolute owner of the paper, or thing, to be protected.

Bank of Mobile v. Hall, 6 Ala. R. 639.

Cullum v. Br. Bank of Mobile, 4 Ala. R. 21.

Hull & Leavens v. P. & M. Bank of Mobile, 6 Ala. R. 761.

Andrews & Bros. v. McCoy, 8 Ala. R. 920.

Nelson & Hatch v. Dunn, 13 Ala. R. 259.

McKenzie v. Br. Bank at Montgomery, 28 Ala. R. 606, and authorities therein cited.

The bank parted with nothing valuable.

Stalker v. McDonald, 6 Hill R. 93.

In Swift v. Tyson, 16 Peters, 1, the question before this court was, whether a negotiable instrument received in payment of a pre-existing debt, was received in the usual course of trade. This court held the affirmative, as to which, the the Supreme Court of Alabama is in accord with this court. Mr. Justice Story, who delivered the opinion of the court, in

argument, went beyond the point involved, and held that one who receives negotiable paper before maturity, and without notice of the equities of the maker, as collateral security for a pre-existing debt, receives it in the usual course of trade, and is protected. From this part of the opinion Mr. Justice Catron dissented, upon the ground that it was *obiter dictum*.

See Bank of Mobile v. Hall, *supra*.

Stalker v. McDonald, 6 Hill, *supra*.

7. The instruction, or charge, numbered 5, page 13 of the Record, should have been given to the jury. A corporation is an artificial person, and is dependent, for all its powers, upon the law of its creation. In the absence of such power its contracts are void and no court of justice will enforce them. The evidence and pleadings tended to show that the Tallassee Manufacturing Company No. 1, was a corporation under the laws of Alabama. There was no evidence that it had power to sell its stock on a credit. The burden of proving its right to recover was on the bank.

Grand Lodge of Ala. v. Waddill, 36 Ala. R. 313.

Saltmarsh v. The P. & M. Bank, 14 Ala. R. 668.

Bank of Augusta v. Earle, 13 Peters R. 519.

4. There was no averment in the declaration that the note in question had ever been endorsed to the bank, and no evidence of that fact was offered, except the words written on the back of the note, "B. H. Micou, Pres't." This did not prove that the note was endorsed by the "Tallassee Manufacturing Company No. 1." the corporation to which it belonged. There was no evidence of the authority of "B. H. Micou, Pres't," to endorse or transfer paper belonging to the manufacturing company.

See Marine Bank v. Clements, 3 Bos. R. 600.

Without a legal endorsement, so as to transfer the legal title to the bank, it can not stand in the attitude of a *bona fide* holder for value, so as to deprive the maker of his defenses to the note.

Hull & Leavens v. P. & M. B'k Mobile, 6 Ala. R. 761.

5. Plaintiff in error proved, in the court below, a valid defense to the note as between him and the payee. It was obtained by false and fraudulent representations. There was no longer any presumption that the bank was a *bona fide* purchaser of the note for value, before maturity, in the usual course of business. The burden of proving these things was, at once, put on the bank, and failing in the proof of them it could not recover.

Battle v. Weems, 44 Ala. R. 105.

Ross v. Drinkard, 35 Ala. R. 434.

Wallace v. Br. Bk. of Mobile, 1 Ala. R. 565.

Thompson v. Armstrong, 7 Ala. R. 256.

6. Charges numbered 4 and 9, on pages 13 and 14 of the Record, should have been given to the jury as prayed. The evidence tending to show notice to the bank, or to put it on the inquiry as to defenses against the note, before acquiring it, is—1st. From the 5th November back anterior to July 25, 1873, the bank, through its officers, knew of the embarrassed financial condition of the manufacturing company. 2d. They knew before July 25th that Oates contemplated taking stock in the company. He conferred with the president and cashier about it. 3d. The note was payable to Micou, president, at the office of Tallassee factory. 4th. Micou told Baldwin, president of the bank, that all the notes, offered on November 4, 1873, as collaterals, were given for stock; and Baldwin testified that while he did not know it, he had reason to believe that said note was given for stock in said manufacturing company. 5th. The officers of the bank

included Oates, the plaintiff in error, for he was a stockholder and *director* of the bank at the time it acquired his note. See page 8 of the Record. Notice to the president, cashier or directors, was notice to the bank.

These charges should, therefore, have gone to the jury. Nor was the error of their refusal cured by the latter part of the instruction given to the jury, at the request of the bank, in relation to "notice of any defect in, or defense to, said note"—page 15 of the Record—for the bill of exceptions states—bottom page 11 of the Record—that none of the officers had any notice, at the time the bank obtained it, of any defect in or defense to said note, "except what may be implied from the facts herein set forth;" and one, of the facts, is that Oates was an officer—a director—of the bank, when it acquired his note. This part of the instruction, therefore, confined the jury in their deliberations to direct notice, excluding the evidence of implied notice, and was an invasion of their province.

36 Ala. R. 449, 5 point; 9 Ala. R. 348.

The latter part of the charge, given for the bank, was also objectionable, because the jury had just been told, in the first part, in substance, that if they believed the recitals of the minute-book read in evidence, to be true, then the bank was a *bona fide* holder of the note for value. The first part of the charge selected a portion of the evidence—ignored the evidence outside of the minute-book, (which was as to payment of usurious interest as a part of the contract for extension, on page 8 of the Record,) and was tantamount to an instruction, that if the jury believed that the contract was, as the minute-book of the bank said it was, the bank was a *bona fide* holder of the note for value and entitled to recover. That part of the charge given, broke down the case of the defendant in the court below, with the jury; for if the bank was a *bona fide* holder of the note for a valuable consideration, what more was necessary to entitle it to a verdict?

Hence, the latter part of the charge was a tautalogical redundancy.

Ward v. Winston & Co., 20 Ala. R. 167.
Edgar v. McArn, 22 Ala. R. 796, 9th point.
39 Ala. R. 684.

8. The court below charged the jury, *mero mortu*, that if the indebtedness of the Tallassee Manufacturing Company to the bank was based, "in part or in whole, upon a valid and legal consideration * * * then the transfer of the note to the bank was based on a valid contract."—Vide p. 12, Record. This part of the charge was erroneous in two respects.

1st. If the indebtedness of the Manufacturing Company to the Bank was based, "in part" only, upon "a valid and legal consideration," the other part may have been illegal, and we insist that illegality in part contaminates and makes void the whole.

See Wilson v. Webb, 20 Ohio St. R. 431.

And, secondly, the charge assumes that if the Manufacturing Company owed a lawful debt, the transfer of the note to the Bank was lawful, without regard to the manner of the transfer, whether before or after maturity, with or without notice, with or without a consideration, or upon an illegal as well as a legal consideration. The court below simply asserted, "as matter of law," to the jury, that if the Tallassee Manufacturing Company owed the Bank a lawful debt, and gave it the note as collateral security, that this, without more, was a valid transfer of the note; and then added the following sentence: "The contract was not such as to violate the security taken on it."

This was a charge, without request or hypothesis, directly upon the effect of the evidence, which was a violation of the plain letter and spirit of the law.

Rev. Code of Ala., § 2678.
Edgar v. The State, 43 Ala. R. 312.

Knight's Adm'r v. Vardeman, 25 Ala. R. 262.

Stewart v. Russell, 38 Ala. R. 619, and authorities therein cited.

Section 721 Revised Statutes United States reads: "The laws of the several States, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." Now, section 2678 Rev. Code, establishes a rule of decision in Alabama, which, applied to the charges of the court discussed above, demonstrates the error of giving those instructions to the jury. According to the rule there laid down, the court invaded the province of the jury.

Brick. Dig. vol. 1, p. 342, sec. 98.

In the case of Swift v. Tyson, *supra*, this court construed the 34th section of the judiciary act (copied above as section 721 Rev. Statutes) as not furnishing a rule of decision as to questions of general commercial law, &c.

It is therein distinctly announced that this court, while treating with respect the decisions of the State courts, will decide for itself, without feeling bound to follow them as precedents, all questions of this general character; but that the judiciary act embraces the statutes and laws of the State, strictly local, and the construction thereof by the local tribunals furnish rules of decision in the courts of the United States.

Now, but for a local law of the State, passed and approved April 8th, 1873 (Acts General Assembly of Alabama, session of 1872-3, pp. 111-112) there would have been no question of commercial law in the case, nor indeed any case at all. The note of the plaintiff in error, but for the act referred to, is not a commercial instrument. Section 1833 Rev. Code

was in the following language: "Bills of exchange and promissory notes, payable in money at a bank or private banking house, are governed by the commercial law, except so far as the same is changed by this Code." The act of April 8th, 1873 amended the section so as to make it read as follows: "Bills of exchange and promissory notes, payable in money at a bank or certain place of payment therein designated, are governed by the commercial law."

The change wrought in the old law by the amendment was in omitting the words, "or private banking house," and substituting therefor the words, "or certain place of payment therein designated." In July, after this change was made in the statute, the note in question was given, payable *at the office of the Tallassee Factory, Montgomery*, without reference to the statute. But for this amendment, the note falls within section 2523 Rev. Code, which is in these words: "Every action founded upon a promissory note, bond, or other contract, express or implied, for the payment of money, must be prosecuted in the name of the party really interested, whether he have the legal title or not, subject to any defense the payor, obligor, or debtor may have had against the payee, obligee, or creditor previous to notice of the assignment or transfer," &c. This part of the section has never been changed, and is still the law. The latter part of it excepts from such defenses bills of exchange and promissory notes payable at a bank, &c., as to which suit must be brought in the name of the person holding the legal title.

Section 1839 Rev. Code was, when said note was made, and is now, the law of the State. It reads as follows, viz.: "All contracts and writings, except bills of exchange, promissory notes payable in money at a bank or private banking house, and paper issued to circulate as money, are subject to all payments, sets-off, and discounts, had or possessed against the same previous to notice of the assignment or transfer." The word "discounts," as used in this statute, "extends, by just construction, to all legal objections to the consideration of such contracts as are herein provided for."

Robinson v. Crenshaw, 2 Stew. & P. Ala. R. 259.

Norton v. Rose, 2 Wash. R. 233.

The note is commercial paper, if at all, alone by virtue of a statute of the State of Alabama. It was made in Alabama, and is payable at a designated place in Alabama; and the question as to whether the equities between the antecedent parties to it are available to the maker, as a defense against it in the hands of the Bank, must be determined by the Alabama law—the *lex loci contractus.*

Story on Bills of Exchange, section 163.

"If, by the law of the place of a contract, (even although negotiable), equitable defenses are allowed in favor of the maker, any subsequent endorsement will not change his rights in regard to the holder. The latter must take it *cum onere.*"

Story on Conflict of Laws, sections 332 and 317.

2 Kent's Commentaries, p. 459, 4th ed.

Slocum v. Pomroy, 6 Cranch, 221.

Ory v. Winter, 16 Martin R. 277.

Chartess v. Cairus, Ib. 1; 12 Martin, 475.

To show that the court below was in error, in instructing the jury that the amending of Sec. 1833, by act of April 8th, 1883, also amended by implication Sec. 1839 of the Revised Code, so as to cut off and deprive the plaintiff in error, of the defenses to said note allowed by the latter section, a careful examination of the statute law of the State, applicable to the case, is necessary. The act of April the 8th, by expunging from section 1833, the words "except so far as the same is changed by this Code," accomplished nothing except to rid it of a redundancy. Before the amendment, the section would have had the same meaning without them as with them, and have been more perspicuous. Chief Justice Walker so regarded it, for in preparing the index or syllabus of the section in the Revised Code, he made no note of these words. They could have had no operation, since many of the succeeding sections, in the same chapter, established innovations upon and exceptions to the *lex mercatoria* of the common law, and were as potent in their operation as though the words, "except so far as the same is changed by this Code," had never been in Sec. 1833. All the sections

of Chapter 4, Title 3, of Part 2 Revised Code, are in *pari materia*, and established a statutory system of commercial law for the State. What change, then, was wrought by the act in question? That clause of Sec. 1833, making promissory notes that were payable at a private banking house, governed by the commercial law—*i. e.* Alabama commercial law—was stricken out, and the following substituted: "Or certain place of payment therein designated." This was the only material change made in the section by the amending act. There is, manifestly, no change in the old law as to bills of exchange and promissory notes payable in money at a bank. The object of the Legislature was, doubtless, to create a new class or species of commercial paper, clothed with the characteristics, or qualities of negotiability, and entitled to days of grace, subject to protest for non-payment, and requiring notice thereof to charge the endorser, and exempt from all defenses against it, arising subsequent to notice of its assignment or transfer. This the Legislature did, by the amending act of April 8th, 1873. But it went no further since Sec. 1839 Revised Code, in the same chapter and on the same page with section 1833 was not amended, and as it stands, this new commercial instrument—promissory notes payable in money at a certain place of payment therein designated—not being one of the exceptions therein made, is subject to all sets-off, payments and discounts had, or possessed against the same, previous to notice of the assignment or transfer. As to ordinary promissory notes, not governed by the commercial law, the maker can, if not estopped, plead a defense growing out of the contract, subsequent to notice of the transfer.—Clements v. Loggins, 2 Ala. R. 514.

In 1876 there was a codification of the statute law of Alabama, under legislative authority. The Code of 1876 was adopted by act of Assembly, approved Feb. 2d, 1876. The codifiers, under their authority, inserted among the exceptions in sections 2112 and 2113, (1851 and 1852 Revised Code,) promissory notes payable at "a certain place of payment therein designated," to make them conform to Sec.

1833 Revised Code as amended, but no change has ever been made in Sec. 1839, now Sec. 2100 Code of 1876. It cannot, therefore, be presumed that the Legislature ever intended to make any change in Sec. 1839. The maxim, *expressio unius exclusio est alterius*, is as applicable to the construction of statutes as it is to contracts.—Hamilton v. Williams, 26 Ala. R. 527. The Legislature did not intend by the amendment of section 1833 of the Revised Code, to revise the whole statute law of Alabama, relating to negotiable commercial paper.

Section 2, of Article 4 of the Constitution of 1868, which was the fundamental law of the State in 1873, declares that "each law shall contain but one subject, which shall be clearly expressed in its title; and no law shall be revised or amended unless the new act contain the entire act revised, or the section or sections amended; and the section or sections so amended shall be repealed."

The title of the amending act is as follows, to-wit:

"An Act
To amend Section 1833 of the Revised Code of Alabama."

And the second section of the act reads: "Be it further enacted, That said section 1833, as it stands in the Revised Code, is hereby repealed." There is no general repealing clause of all laws in conflict with the new act.

The clause of the State Constitution quoted above is mandatory and an inhibition upon the Legislature. "No law shall be revised or amended unless the new act contain the entire act revised, or the section or sections amended." How then could there be a revision or amendment of any law under this Constitution *by implication?* The idea is absurd.

The Supreme Courts of Michigan and of Indiana have held that statutes of those States may be *amended by implication.* But the Constitutions of those States are less restrictive of the powers of the Legislature than that of Alabama.

The doctrine of repeals by implication is a familiar branch of the law, but that of amendment by implication is com-

paratively new and imperfectly defined. Now, where the necessary effect of a new act is to repeal or abrogate a repugnant part of an existing statute, that may, with propriety, be called *an amendment by implication*. But by implication to interpolate new matter into an existing statute, thereby giving it the force and effect of an affirmative enactment, or a new statute, is an anomaly in the law. It is nothing short of creating a new law by construction and without legislative sanction, which would be a usurpation by the judiciary, and in violation of the constitutional distribution of the powers of government, State and Federal, into three departments. The ruling of the court below, on the construction of the act amendatory of section 1833, was that "it by necessary implication amends section 1839, and adds to the exceptions named in it, promissory notes payable in money at a designated place."—See Record, p. 15.

Is there in fact a repugnancy between section 1833, as amended, and section 1839? Is not the latter a mere limitation upon the former, and so intended to remain, by the Legislature?

Section 1839 declares that "All contracts and writings, except bills of exchange, promissory notes payable in money at a bank, or private banking house, and paper issued to circulate as money, are subject to all payments, sets-off and discounts had or possessed against the same previous to notice of the assignment or transfer."

Amend it, by implication, as the court below did, and it reads: "All contracts and writings, except bills of exchange, promissory notes payable in money at a bank, or private banking house, and paper issued to circulate as money, *and promissory notes payable at a certain place of payment therein designated*, are subject to all payments, sets-off and discounts had or possessed against the same previous to notice of the assignment or transfer."

The introduction of the italicised words as an additional exception was and is judicial legislation, rather than construction. Section 1839 was not strictly in harmony with section 1833 before it was amended, for the former named

among its exceptions, "paper issued to circulate as money," which was not named or referred to in the latter, which is persuasive that each section was but part of a uniform system of statutory commercial law.

"A repeal by implication is not favored. The leaning of the courts is against the doctrine, if it be possible to reconcile the two acts of the legislature together."

McCool v. Smith, 1 Black, 470.

"It is deemed against the policy of the law to favor repeals by implication."

Smith on Stat. and Con. Law, section 758.

"If two conflicting statutes," by interpretation, "may stand together, they shall so stand, and if two laws only so far disagree or differ as that they may, by any other construction, both stand, they will both be upheld; for whenever this can be done, the rule that subsequent laws abrogate prior ones, does not apply, and the last law will not operate as a repeal of the former. When it is not manifestly the intention of the legislature that a subsequent act shall control the provision of a former act, the subsequent shall not be construed as having such an operation, even though the words, taken strictly and grammatically, would repeal the former act."

Smith on Stat. and Con. Law, section 757.

4 Gill. & John. 6.

"Laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject, and it is, therefore, but reasonable to conclude that the Legislature, in passing a statute, did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable, and hence a repeal by implication is not favored; on the contrary, courts are bound to uphold the prior law, if the two acts may well subsist together."

Sedgwick on Stat. and Con. Law, p. 127.

3 How. U. S. R. 636.

5 Hill, 221.

10 Barr, 442.

21 Penn. 37.
2 Barb. S. C. R. 316.
33 Ala. R. 693.
3 Ala. R. 626.
23 Ala. R. 240.
6 Porter, 219.

If the amendment of section 1833 operated a repeal, or an amendment by implication, of section 1839, still greater reasons exist for holding that it in like manner repealed or amended sections 1851 and 1852 of the same Code, as is manifest by an inspection of those sections. Is it possible that the Legislature intended to repeal or amend sections 1839, 1851, and 1852, as well as 1833, and, nevertheless, left this result to be accomplished by the dubious means of construction and judicial implication? But section 1833, as amended, and section 1839, as it stands in print, can be so construed without doing violence to either, that they may stand together and each have a field of operation. Section 1833 makes promissory notes that are payable in money at a certain place of payment therein designated, to be governed by the commercial law, just as bills of exchange and promissory notes payable in money at a bank, as to days of grace, protest, and notice, while section 1839 subjects that class of commercial instruments, to-wit: *promissory notes payable in money at a certain place of payment therein designated*, in the hands of a transferee, to "all payments, sets-off, and discounts had or possessed against the same previous to notice of the assignment or transfer."

The learned judge who presided on the trial in the court below, in construing these statutes, held the following language: "Did the Legislature intend the act of April 8, 1873, to affect notes, payable in money at a designated place, only as to days of grace, presentment, and notice of dishonor? I think not. That is, to my mind, a cramped, strained and unreasonable construction of the statute."

It seems that he attached very little importance to the questions of "days of grace, protest, and notice of dishonor." But the Legislature differs with his Honor, as the

three next succeeding sections of the Revised Code are devoted to conferring, regulating and limiting these high commercial privileges. They are as follows:

"§ 1834. All other instruments payable in money at a bank or private banking house, are governed by the commercial law, as to days of grace, protest, and notice.

"§ 1835. No days of grace are allowed on any contracts except those enumerated in the two preceding sections.

"§ 1836. If any paper payable in this State entitled to grace, by the allowance thereof becomes due on Christmas, the fourth day of July, or the first day of January, such paper is due on the day previous to such day, unless such previous day is Sunday; in which case it is due on the Saturday preceding."

Did the amendatory act, declaring promissory notes made payable at *a certain place of payment therein designated*, governed by the commercial law, in the language of the court below, "lift this class of paper from under the limitations of the previous legislation of the State," when there is nowhere to be found any "previous legislation of the State" as to "this class of paper?" Promissory notes payable at "a certain place of payment therein designated," were never known, *eo namine*, to the legislation of the State prior to the act of April 8, 1873. That act created a new class of commercial paper, to be governed by the commercial law, "as known in Alabama," we admit, but not by the commercial law "as known in the United States, and as known throughout the commercial world," in the language of the court below. The statutes of the State, we respectfully submit, are not quite so extensive in their operation. They are wisely confined to her own territory. The act creating it has conferred upon this new commercial instrument all the dignity, privileges, and negotiability of a promissory note payable in money at a bank, save only that by leaving section 1839 in tact, the Legislature has subjected it to defenses of payment, sets-off, and discounts had or possessed against it previous to notice of assignment or transfer. But, being governed by the commercial law, it is exempt, in the hands of a *bona fide* endorsee before its maturity, from any other defenses than those enumerated in section 1839. Thus we

have a field of operation for both the new and the old law, where, in the language of Sedgwick on Constitutional and Statutory Law, "the two acts may well subsist together."

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UNITED STATES SUPREME COURT.

W. C. OATES, *Plaintiff in Error*,
vs.
FIRST NATIONAL BANK OF MONTGOMERY. } No. 74.

Brief of Plaintiff in Error.

W. HALLETT PHILLIPS,
for plaintiff in error.

R. O. POLKINHORN, PRINTER, WASHINGTON, D. C.

UNITED STATES SUPREME COURT.

W. C. OATES, *Plaintiff in Error*,
vs.
FIRST NATIONAL BANK OF MONTGOMERY. } No. 74.

Brief of W. Hallett Phillips, for Plaintiff in Error.

On the 25th July, 1873, Oates gave his note for $5,200 to B. H. Micou, president, payable at the office of Tallassee Factory, Montgomery, and at the same time entered into the following agreement with Byington, agent of the Company:

EUFAULA, *July 25th*, 1873.

Whereas Col. Wm. C. Oates has this day given his note for fifty-two hundred ($5,200) dollars, payable December first proximo, to the order of B. H. Micou, president, for and in consideration of fifty shares Tallassee stock, viz: certificate No. 330: now, it is understood and agreed that Col. Wm. C. Oates has the option at that time of returning the above certificate of stock, and receiving therefor the above-described note, duly cancelled.

J. S. BYINGTON,
Special Agent Tallassee Factory,

Oates had been induced to give this note by fraudulent representations of Byington as to the solvency and condition of the Tallassee Company.

The Company, being indebted to the Bank, plaintiff in

this action, to a large amount, on the 4th of November, 1873, applied for an extension.

As a condition to such extension, the Bank required the Company to give collateral security and a payment of one and one-quarter per cent. per month interest.

This proposition was accepted, and the Company deposited with the Bank, as collateral security, among other notes, that of the defendant.

The president of the Company testified that, before the extension was agreed upon, he informed the Bank that the note was given for stock.

On the first of December, 1873, the defendant tendered his certificate of stock to the company and demanded his note to be delivered up.

Being informed that the note was held by the bank as collateral security he made the same demand on the bank, but it was refused.

In 1875 suit was brought upon the note by the bank against Oates. He pleaded the special facts above set forth; that the bank was not a *bona fide* purchase for value in the usual course of trade, and that the debt for which it was accepted as security was usurious. p. 4.

On the first trial the verdict was for defendant, but was set aside, and on the second trial went for the plaintiff.

In addition to what has been already stated it was shown at the trial that before 25 July, 1873, the defendant had made inquiries of the president of the plaintiff's bank as to the stock of the company, and was informed that it was pretty good. And further, that no inquiry was made of the defendant by the bank before it had acquired the note. pp. 8. 10.

The court charged the jury that if the indebtedness of the company to the bank was in part or whole based upon a valid consideration, then the transfer of the note to the bank was a valid contract. That the contract was not such

as to violate the security taken on it. This was excepted to, and to this and the other charges of the court, and the refusal of the court to give the charges asked by the defendant, the assignment of error is based.

The first, second and third exceptions were to the refusal of the court to charge the jury that the contract to extend a past debt on the payment of usurious interest was void, and that a reception of the note on a contract on an agreement to pay one per cent. per month interest did not constitute the plaintiff a *bona fide* holder as to prevent the defendant from setting up the equities.

The fourth prayer, which was refused, is that if the time the plaintiff acquired the note it had notice it was given for stock and notice of facts from which it ought reasonably to have presumed that defendants had been induced to make it on account of fraudulent representations, then the plaintiff is charged with notice of all such facts as it could have learned by inquiry of defendant.

The fifth, that if the note was given for stock, then, unless it was shown, the company had a right to sell its stock for credit recovery could not be had.

The sixth, that if plaintiff's title to the note was obtained as collateral security for the payment of past indebtedness extended on a usurious consideration, and if the defendant had reserved the right to surrender to the payee his stock when the note fell due and receive the note, and he exercised that right, the plaintiff could not recover.

The seventh, that if the plaintiff, having a claim against the company for moneys advanced at a usurious rate of interest, in order to secure its payment agreed to take the note sued on as collateral security, and at the same time further extend the payment of the indebtedness at a usurious rate of interest, the plaintiff was not such a holder as to prevent the setting up of the equities.

The eighth is that, under the laws of Alabama the fact

that the promissory note was made payable at a designated place, does not prevent the defendant from making any valid defense allowed by section 1839, Rev. Code of Ala., which he had to, in the hands of the payee before notice of the transfer to plaintiff's.

The ninth was that if the bank at the time it acquired the note had notice of such facts and circumstances as should have put in upon guard and induced a prudent man to make inquiries, its failure to do so, with a view of avoiding such knowledge, was evidence of bad faith.

Each of these exceptions were asked separately and all refused. As to the provision of sec. 1,839, Rev. Code, the court held it was repealed by the act of April 8, 1873.

The following charge was given by the court at the request of the plaintiff:

"If the jury believe from the evidence that the note sued on was acquired by the bank under and by virtue of the agreement, as stated on the minute book of the bank read in evidence, then the bank is a *bona fide* holder for a valuable consideration; and if the jury further believe from the evidence that the bank at the time it acquired the note had no notice of any defect in or defense to said note, and was not guilty of bad faith in taking said, then the jury must find for the plaintiff, although more than legal interest may have been paid."

The single question in the case, is, whether the defendant can enforce against the plaintiff equities good against the payee.

Plaintiff in error contends that the court below ruled erroneously in holding that the instrument in suit was negotiable and not subject in the hands of the plaintiff below to the defense set up.

Section 1836, Rev. Code 1867, reads: "Bills of exchange and promissory notes payable in money at a bank or private banking house, are governed by the commercial law, except so far as the same is changed by this code."

Section 1839. "All contracts and writings, except bills of exchange and promissory notes payable in money at a bank or private banking house, and paper issued to circulate as money, are subject to all payments, set-offs and discounts had or possessed against the same, previous to notice of the assignment or transfer.

The act of April 8, 1873, is as follows:

An act to amend Section 1833, of the Revised Code of Alabama.

Be it enacted by the General Assembly of Alabama, that Section eighteen hundred and thirty-three, of the Revised Code, which reads as follows: Section 1833 (1525). Bills and notes payable at a banker's or private banking house, are negotiable instruments; bills of exchange and promissory notes, payable in money at a bank or private banking house are governed by the commercial law except so far as changed by the code, be so amended as to read as follows: Section 1833 (1525). Bills and notes payable at a bankers, or a designated place of payment, are negotiable instruments; bills of exchange and promissory notes payable in money, at a bank or a certain place of payment, therein designated, are governed by the commercial law.

Sec. 2. *Be it further enacted*, that said Section 1833, as it stands in the Revised Code, is hereby repealed.

Approved April 8, 1873. Acts 1872–3, p. 111.

The court ruled that the act of 1873, amended *Sec. 1839* so as to make paper payable at a designated place, like notes and bills payable at a bankers, free from defenses, allowable in other classes of paper. The note in this case was payable at the office of The Tallassee Manufacturing Co.

We submit that the legislature did not, by the act of 1873, amend Section 1839. That act can have a sensible construction by confining its operation to Section 1833, as declared by the legislature.

The meaning and scope of the latter section is shown by the course of legislation on the subject.

By the act of 1812, Aiken's Dig., 329, Sec: 6, it is provided: "That all bonds, obligations, bills single, promissory notes, and all other writings for the payment of money or any other thing, may be assigned by endorsement, whether the same may be made payable to the order or assigns of the obligee or payee or not; and the assignee may sue in his own name, and maintain any action which the obligee or payee might have maintained thereon, previous to assignment; and in all actions to be commenced and sued upon any such assigned bond, obligation, bill single, promissory note or other writing as aforesaid, the defendant shall be allowed the benefit of all payments, discounts and set-offs, made or possessed against the same, previous to notice of the assignment, in the same manner as if the same had been sued and prosecuted by the obligee or payee therein; and the person or persons to whom such instrument, so payable, is assigned, may maintain an action against the person or persons to whom such instrument, so payable, is assigned, as in cases of inland bills of exchange."

Doubts having arisen as to the proper meaning of the last words of this act, the legislature in 1828, passed another act.

Aik. Dig., 329, Sec. II.

After reciting that much injury had been done by means of the uncertainty of the decisions of the court, in relation to the proper time in which endorsers of bills and notes made negotiable by endorsement by law, shall make demand of payment of the payors of such negotiable instruments, for remedy whereof it enacts: "That hereafter, the remedy on bills of exchange, foreign and inland, and on promissory notes payable in bank, shall be governed by the rules of the law merchant, as to days of grace, protest and notice.

All other contracts for the payment of money are made assignable as theretofore; provided suit be brought in the first court of the county where the maker resides; and no days of grace shall be allowed on any contract except bills of exchange and notes payable in bank.

By act 1832, Clay's Dig., 383, § 16, bonds and other instruments, payable in bank, shall be governed by the rules of the law merchant as to days of grace, demand, and notice, in the same manner as bills of exchange and notes payable in bank now are.

It will be seen that sec. 1833, Rev. Code, is but a reenactment of the legislation of 1828, which specified that bills of exchange and promissory notes payable in bank should be subject to the law merchant, as to days of grace, protest, and notice, while all other classes of paper mentioned by the act of 1812 have no such incidents.

The acts of 1828 and 1832 contain legislative declarations as to what is meant by the rules of the law merchant.

The expression, commercial law, in sec. 1833, is its equivalent.

When, therefore, the act of 1873 was enacted it merely amended sec. 1833, by subjecting to these rules of the commercial law promissory notes payable at a designated place.

Section 1839 is not referred to in this act, and we contend remains intact. That it was only sec. 1833, which it was proposed to amend, is shown from the fact that the whole of it is incorporated in the amendatory act. The code of 1876 retains sec. 1839. Code Ala., 1876, sec. 2097.

It was beyond the power of the Legislature, even if it so intended, to amend sec. 1839 by the act of 1873.

By section 2, Art. 4, constitution of Alabama, in force at the time, it is provided:

"Each law shall embrace but one subject, which shall be described in the title; and no law or any section of any law shall be revised or amended by reference only to its title or number, but the law or section revised or amended, shall itself be set forth at full length."

This clause of the constitution not only prescribes a rule of legislative procedure but is mandatory, and renders null and void a law not conforming to its requirements.

Tuskaloosa Bridge Co. vs. *Olmstead*, 41 Ala., 9; *Weaver* vs. *Lapsley*, 43 Ala., 224; *Boyd* vs. *Ala.*, 94 U. S., 648.

It follows that the court was wrong in charging that the agreement under which Oates gave his note could not be set up against the action on the note.

But assuming that the paper is protected from the equities existing between the original parties by virtue of the act of 1873, we contend that the plaintiff below was not a *bona fide* purchaser for value in the usual course of trade.

That one who takes a negotiable paper as collateral security for the payment of a preexisting debt is not a purchaser for value in the course of trade is the settled doctrine of Alabama.

Fennouille vs. *Hamilton*, 35 Ala., 322.

The decisions declaring this reach from *Bank Mobile* vs. *Hallett*, 6 Ala., 645, down to the present time.

It is asserted that the agreement by the bank to extend the indebtedness of the Tallassee Co. was a sufficient consideration to make the bank a purchaser for value.

The inducement moving the bank to make the extension was the payment of one per cent. per month interest. To constitute a consideration for value, the creditors must not only agree to forbear, but such agreement must be legal.

The agreement of the bank being usurious could not be enforced, and therefore constituted no valid consideration.

In *Levy* vs. *Gadsby*, 3 Cr., 180, the action was brought by the endorsee against the endorser. The defense was usury, by which it was acquired, being negotiated for a forbearance with reference to a preexisting debt in consideration of which the note was endorsed to plaintiff. The court allowed the defense.

In *Gaither* vs. *The Bank*, the bank had acquired title to a valid note by endorsement of the payee as collateral security for a usurious contract. This court held that the

endorsement of the note to the bank was of no validity, although the note itself was not usurious.

In answer to the objection that the maker of the note was a stranger to the transaction and ought not to be permitted to avail himself of the usurious contract between the endorser and endorsee, and thus avoid his just debt, the court answers that the maker did not propose by this defense to relieve himself from paying the note; it went only to his liability to pay the party suing.

1 Pet., 37.

In the case cited the court permitted the maker of the note to set up the usury and thus defeat a recovery, though he owed the debt. In the case at bar no recovery could have been had by the payee of the note against the maker.

The agreement to extend the debt, is endeavored to be supported on the ground that the note was taken as collateral security for the payment of the existing indebtedness of the company to the bank.

The contract not being severable no recovery can be had.

"If any part of an indivisable promise or any part of an indivisable consideration for a promise is illegal, the whole is void." Per GIBSON, Ch. Jus. *Filsons* vs. *Hines*, 5 Barr., 452; 3 Rob., Pr., 539; where the cases are collected. The evidence showed that this indebtedness itself existed at the time of taking the note by reason of previous extensions ~~or~~ usurious agreements.

The court, therefore, committed error in charging that if the indebtedness of the Tallassee Man. Co., to the bank upon which this note was taken, was in part or in whole based upon a valid consideration, the transfer of the note was valid.

The plaintiff below was not only not a purchaser for value in the course of trade, but he was not a *bona fide* purchaser so as to preclude the assertion against it of the equi-

ties existing between the original parties, having acquired the note on a usurious contract.

Saltmarsh vs. *P. & M. Bank*, 14 Ala., 688;
Carlisle vs. *Hill*, 16 Ala., 406.

The judgment of the court below should be reversed.

W. HALLETT PHILLIPS,
for plaintiff in error.

In Supreme Court of United States.

OCTOBER TERM, 1879.

WILLIAM C. OATES, PLAINTIFF IN ERROR,

No. 74.] VS.

THE FIRST NATIONAL BANK OF MONTGOMERY.

DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR,

—BY—

HENRY C. SEMPLE.

BARRETT & BROWN, PRINTERS.

In Supreme Court of United States.

OCTOBER TERM, 1879.

WILLIAM C. OATES, PLAINTIFF IN ERROR,

No. 74.] VS.

THE FIRST NATIONAL BANK OF MONTGOMERY.

BRIEF FOR DEFENDANT IN ERROR.

This suit was brought by the First National Bank of Montgomery, which is an association incorporated under the National Banking Act, against William C. Oates, plaintiff in error, upon a note, of which the following is a substantial copy:

"$5,200 00 EUFAULA, ALA., July 25th, 1873.

On the first day of December next, for value received, I promise to pay to the order of B H. Micou, President, five thousand two hundred dollars, payable at the office of Tallassee Factory, Montgomery.

WM. C. OATES."

This note was given in consideration of fifty shares of the capital stock of the Tallassee Manufacturing Company No. 1, purchased by the plaintiff in error from one Byington, as agent of said company. At the time the note was given, Byington, as said agent, gave the plaintiff in erroi a certificate for said shares, numbered 330, and also a written instrument, of which the following is a substantial copy:

"EUFAULA, July 25th, 1873.

Whereas, Col. Wm. C. Oates has this day given his note for fifty two ($5,200) hundred dollars, payable December first proximo, to the order of B.

H. Micou, President. for and in consideration of fifty shares Tallassee stock, viz.: Certificate No. 330. Now it is understood and agreed that Col. Wm. C. Oates has the option, at that time, of returning the above certificate of stock, and receiving therefor the above described note duly canceled.

J. S. BYINGTON,
Special Agent Tallassee Factory."

This agreement was on a separate piece of paper from the note, and was retained by the plaintiff in error in his possession. On the first day of December, 1873, the plaintiff in error tendered to the officers of the company said certificate of stock and demanded the note.

There was evidence tending to show, that at the time said stock was purchased by the plaintiff in error, Byington, as an inducement to the plaintiff in error to purchase said stock, made fraudulent representations as to the solvency and indebtedness of the company, and its dividends, upon which representations the plaintiff in error relied.

The Tallassee Manufacturing Company being indebted to the Bank to the amount of about forty thousand dollars, which indebtedness matured during the month of November 1873, applied to the Bank to extend such indebtedness; and, on the 5th day of November 1873, it was agreed that the Bank would extend said indebtedness thirty, sixty, ninety and one hundred and twenty days, upon the company giving the bank certain specified collateral securities for said extended indebtedness. The collateral securities were given and the indebtedness extended accordingly, and the Bank released forty-six bales of cotton, which it held as security for a part of said indebtedness. Among the collateral securities thus given, on the extension of said indebtedness, was the note sued upon, which was, at that time, transferred and indorsed to the Bank.

Upon the extension of said indebtedness, the company paid the Bank a rate of interest greater than eight per cent. per annum, all which interest was paid in advance at the time the indebtedness was extended, and none of which was carried into the bills or paper given for the extended indebtedness. This indebtedness had been previously extended on

several occasions at usurious interest, but all such interest was invariably paid in advance.

None of the officers of the Bank, at the time the note sued upon was transferred and indorsed to the Bank, and at the time it was agreed to extend said indebtedness, and the extension was granted, had any notice of any defect in or defence to the note sued upon, or, of any equities between the parties to said note.

The plaintiff in error, who was, at the time said note was given by him, and until after December 1873, a stockholder and director of the Bank, resided in Eufaula, which was a town about eighty miles from Montgomery, connected with it by a railroad and a telegraph line. The officers of the bank made no enquiry of the plaintiff in error as to any defense to the note before receiving it as collateral security.

There was conflicting evidence as to whether any of the officers of the bank had notice, that the consideration of the note was stock in the Tallassee Manufacturing Company. The company suspended payment of its debts about December 1873, and made an assignment of all its property to trustees, and, at the time of the trial of this case, a receiver had been appointed by the State chancery court to wind up its affairs.

There was no evidence that the company was a corporation, or as to its power to sell its stock on a credit, or as to the power of the president to indorse and trade or pledge the promissory notes or other paper belonging to the company, or that the company was a bank or private banking house; but it was proved, that, at the time the note sued upon was given and at the time of its maturity, the company had an office in Montgomery, Alabama.

Two of the exceptions, taken by the plaintiff in error, relate to the admissibility, as evidence, of a letter written by the president of the Bank to the plaintiff in error, and, of the contract, by which the note sued upon was transferred to the bank, as entered on the minute-book of the Bank.

The cashier of the Bank wrote to the plaintiff in error, November 24, 1873, informing him that the Bank had the note sued upon for collection as collateral security. In reply thereto, the plaintiff in error wrote a letter to the cashier, November 30, 1873. Both these letters, which are copied in the bill of exceptions, were read in evidence by the *plaintiff in error*. The letter of the president, to the reading in evidence of which objection was made, was written *on the next day*, December 1, 1873, in reply to the letter of the plaintiff in error, above mentioned, and, a few days thereafter, they had a conversation on the subject matter of the letter. The plaintiff in error could have had no reason for putting in evidence the letter of the cashier, other than to base thereon the introduction of his reply; and having first read in evidence a part of the correspondence, it was clearly the right of the Bank to have the entire correspondence read; at least, a letter, which was in reply to one addressed by the plaintiff in error to its cashier. The letter was written on the day following the date of the letter of the plaintiff in error, to which it was a reply; and when letters in correspondence between the plaintiff and the defendant were read in evidence by the former, it was held, that the latter might read his answer to the plaintiff's last letter, dated the day previous.

Roe v. Day, 7 C. & P. 705.

Frischet v. Hamilton Ins. Co., 14 Gray, 456.

1 Greenleaf on Evidence, sec. 201, note, (12th edition).

The cashier of the bank testified, that the contract, by which the note sued upon was transferred to the bank, was correctly entered by him, at the time, upon the minute-book of the bank, and that it was the only written evidence of the contract. Micou, the president of the manufacturing company, and who was a witness for the plaintiff in error, also testified that the entry on the minute book of the bank was a true and correct statement of the contract, and that the extension of the indebtedness was given according to said agreement. This entry, therefore, was the contract as reduced to writing,

and is the highest, best, and in fact only legal evidence of the contract. It was the written contract, acknowlehged and consummated by the parties, although not formally signed, and was admissible in evidence.

Witford v. Tustin, 10 Bingh. 395.

The several points of law, raised by the several charges given and refused, by the Court, may be thus stated:

1. The note sued upon being made payable at a designated place, is, under the laws of Alabama, governed by the commercial law, and the maker is prevented from setting up against a *bona fide* holder for value without notice, any defences which the maker had to the note against the payee before notice of its transfer, and which are permitted by Section 1839 of the Revised Code of Alabama 1867.

2. The payment in advance of usurious interest does not make the contract, by which a national Bank extends a past debt in consideration of collateral security being given therefor, illegal and void under the laws of Congress; and such payment, *in advance*, of usurious interest does not prevent the bank from being a *bona fide* holder.

3. Even if the officers of the Bank had notice of such facts and circumstances, as would have induced a prudent man to make further inquiry; this fact does not charge the Bank with notice of all it would have ascertained by inquiry.

4. The burthen was not upon the Bank to show that the Tallassee Manufacturing Company had power to sell its stock on a credit, and the failure to show such power does not make the note void in the hands of a *bona fide* indorsee.

The defence set up against the note by plaintiff in error was, substantially, that the note was given for stock in the Tallassee Manufacturing Company, and was obtained upon fraudulent representations as to the solvent and prosperous

condition of the company, upon which the plaintiff in error relied; and, also, that, at the time the note was given, and as part of the contract, the agent of the company gave to the plaintiff in error a written agreement securing to him the option of returning the certificate of stock by the first of December thereafter, and receiving therefor the note duly canceled, and, that, on the day mentioned, he did return the certificate of stock, and demanded the return of the note.

Without considering the validity and sufficiency of this defence, upon the evidence set forth in the bill of exceptions, against the note in the hands of even the payee, we will attempt to show, that the plaintiff in error is prevented from setting up this defense to the note in the hands of the Bank.

The note is commercial paper by the laws of Alabama, which is the place of the contract. Prior to 1873, bills of exchange and promissory notes payable in money at a bank or private banking house were the only instruments governed by the commercial law, under the Statutes of Alabama. (Section 1833 of Revised Code 1867). On the 8th day of April 1873, an act of the General Assembly was approved, which amended this section of the Code, so as to make it read as follows: "Bills of exchange and promissory notes payable in money at a Bank or *certain place of payment therein designated* are governed by the commercial law."—(Pamph. Acts, 1872-3, page 111). The note sued upon is payable in money at a certain place of payment therein designated, was given after the passage of this act, and is governed by its provisions.

The plaintiff in error, however, insists, that by section 1839 of the Revised Code, the note is subject to all payments, sets-off and discounts, which he had against it previous to notice of its transfer to the Bank. This section provides: "All contracts and writings, except bills of exchange and promissory notes payable in money at a Bank or private banking house, and paper issued to circulate as money, are

subject to all payments, sets-off and discounts had or possessed against the same previous to notice of the assignment or transfer." A comparison of this section with section 1833 will show, that the exception in section 1839, included all instruments, which prior to the act of April 8, 1873, *were* declared by statute *to be* governed by the commercial law.

The intention and operation of the act of April 8, 1873, are to bring prommissory notes payable in money at a certain place therein designated into the domain of the commercial law, to place them under its protection and to construe, determine and regulate the nature and obligation of the contract by its recognized principles. This was the view expressed by Brickell, C. J., in Cook v. Mutual Insurance Company 53 Ala. R. 37, 39, when he said: "since the making of the promissory note, on the endorsement of which this suit is founded, the statute of April 8, 1873, (Pamph. Acts, 1872-3, p. 1[1]), has converted promissory notes payable in money at a designated place, into negotiable instruments governed by the commercial law. It operates on the nature and obligation of the contract of the parties to such notes, and cannot be construed as affecting notes made and indorsed prior to its passage. The law of force, when the note is made and indorsed, regulates and determines the liability of the parties."

One of the universally recognized principles of the commercial law is that, in the hands of an innocent indorsee for value, negotiable instruments are not affected by any infirmity in their origin, and are not subject to any defense against the payee, or any equities between the original parties, of which the indorsee had no notice. This principle, being within the letter and spirit of the act of April 8th, 1873, is as much a part thereof as if it had been in words expressed and incorporated in the act. This act, thus construed and considered, effectually declared that promissory notes, payable in money at a designated place, were not thereafter subject, in the hands of an assignee for value, to any payments, sets-off, or discounts made or had

before notice of the assignment or transfer, of which the assignee had no notice, when he acquired the note; and is, therefore, in conflict with section 1839 of the Revised Code. Hence, as to promissory notes payable in money at a certain place therein designated, the act of April 8th, 1873, amends or repeals, by implication, section 1839 of the Revised Code.

This conclusion is supported by another consideration. Section 1833 provides that "bills of exchange and promissory notes payable in money at a bank or private banking house are governed by the commercial law, *except so far as the same is changed by this Code.*" In the act of April 8th, 1873, amending this section, the words "*except so far as the same is changed by this Code*" are omitted, and "bills of exchange and promissory notes payable in money at a bank or certain place of payment therein designated are governed by the commercial law," without limitation, restriction, or exception.

If the foregoing is not the true meaning and operation of the act of April 8th, 1873, it is without any effect—it does not enlarge the negotiability of such notes, or protect them in the hands of innocent holders, and does not invest them with any of the elements or immunities of negotiable instruments, further than existed previously; for they were, prior to the passage of the act, assignable by indorsement, but subject to any defense which was had before notice of assignment. (Sections 1838 and 1839 of the Revised Code.)

If it had been intended by the act of April 8th, 1873, that promissory notes payable in money at a designated place should be governed by the commercial law as to days of grace, protest and notice only, as contended by the counsel for plaintiff in error, section 1834 would have been amended instead of section 1833. Section 1834 provides: "All other instruments payable in money, at a bank or private banking house" (meaning instruments other than those specified in section 1833), "are governed by the commercial law *as to days of grace, protest, and notice.*" But the act amends section 1833, thus clearly evidencing that the instruments therein specified are governed by the commercial law in all

other respects and matters, as well as to days of grace, protest, and notice. After the passage of the act amending section 1833, the two sections must be read as follows:

Section 1833. "Bills of exchange and promissory notes payable in money at a bank or certain place of payment therein designated are governed by the commercial law."

Section 1834. All other instruments payable in money at a bank or private banking house are governed by the commercial law, as to days of grace, protest, and notice."

Thus compared and read, it is manifest that the act of April 8th, 1873, amending section 1833, provides a wider range and field of operation, and other and different in many respects than section1834.

It also follows, that, if promissory notes payable in money at a designated place are not, according to the amendatory act, governed by the commercial law in any respects, other than as to days of grace, protest and notice, *bills of exchange*, and notes payable at a bank are not governed by the commercial law in any other respects; for, by the act, all the instruments therein mentioned are governed by the commercial law *in the same respects*.

But we are not left to argument alone. From the legislative history of the State it is ascertained that §§ 1833–1839, inclusive, of the Rev. Code had their origin in an act passed in 1812, which was as follows: "All bonds, obligations, bills single, promissory notes and all other writings for the payment of money or any other thing, may be assigned by indorsement, whether the same be made payable to the order or assigns of the obligee or payee or not; and the assignee may sue in his own name, and maintain any action which the obligee or payee might have maintained thereon previous to the assignment; and in all actions to be commenced and sued, upon any such assigned bond, obligation, bill single, promissory note, or other writing as aforesaid, the defendant shall be allowed the benefit of all payments, discounts, and sets-off, made, had, or possessed against the same, previous to notice of the assignment, in the same manner as if the same had been sued and prosecuted by the ob-

ligee or payee therein; and the person or persons to whom such instrument so payable is assigned, may maintain an action against the person or persons who shall have indorsed the same, as in cases of inland bills of exchange."

The courts having construed that the effect of the concluding words, "as in cases of inland bills of exchange," was to introduce the law-merchant in regard to the indorsement of the note, the Legislature, in 1828, passed another act, which was as follows:

"Whereas, Much injury has been done to the citizens of this State by means of the uncertainty of the decisions of the courts of this State, in relation to the proper time at which the indorsers of bills, notes, bonds, and other instruments, made negotiable by indorsement by law, shall make demand of payment of the payors of such negotiable instruments; for remedy whereof,

Be it enacted, &c., That hereafter the remedy on bills of exchange, foreign and inland, and on promissory notes payable in bank, shall be governed by the rules of the law-merchant as to days of grace, protest and notice; * * * all other contracts, for the payment of money or property, or for the performance of any duty of whatever nature, shall be assignable as heretofore, and the assignee may maintain such suit thereon as the obligee or payee could have done, whether it be debt, covenant, or assumpsit; provided, suit be brought to the first court of the county where the maker resides to which suit can be brought; and if he shall fail to sue the maker to the first court as herein provided for, the indorser shall be discharged from liability, unless suit shall be delayed by his consent. And no days of grace shall be allowed on any contract (except bills of exchange and notes payable in bank), either between the assignee and the maker, or between the assignee and the assignor."

As far back as 1839, the Supreme Court, construing this statute, said: "In the case at bar, the note being payable at bank, is also by our statute, to be regulated

by the law-merchant. It is, however, insisted that the statute only intended to afford the remedy between the indorser and the indorsee, and to permit the latter to recover of the former according to the rules of the law-merchant, and to dispense with a suit against the maker, when the note so indorsed was payable in bank. But, from a careful examination of the statute, we are satisfied that it was the intention of the Legislature that a note payable in bank, when indorsed, should be governed and controlled by the law-merchant, not only as to days of grace, protest, and notice, but also as to all other rights recognized by that law as existing between the parties to the note. The statute is silent as to the right of the maker of a note payable in bank to set up an off-set to the note in the holder, yet it will scarcely be contended that on a note so payable an off-set could be made against an assignee unless the note were taken under such circumstances as would authorize an off-set by the rules of the law-merchant.

We apprehend, therefore, that the Legislature intended to make promissory notes, payable in bank, *negotiable* as *inland bills of exchange*, and to be governed and regulated by the same law."

Smyth v. Strador, Perrine & Co., 9 Porter R. 446–450.

And in O'Hara v. The Bank at Huntsville, 2 Ala. R. 367, it was said: "In the case of Smyth v. Strader, Perrine & Co., 9 Porter, 446, we held that a note payable in bank was, by our statutes, placed on the same footing with inland bills of exchange, and governed and regulated by the law-merchant. Tried by that rule the proof was clearly inadmissible. No principle is better settled, than that no set-off or proof of payment can be received as a defense to an action on a note, or bill assigned before it is due."

In preparing a Code of the statutes of the State, which Code went into effect in February, 1853, the codifiers divided these statutes into sections, as they did many others, and changed in some respects the phraseology so as to make them more explicit, and to conform more clearly with the judicial construction which the statutes had received. These

sections were afterwards incorporated in the Revised Code of 1867, the numbers of the sections only being changed. When the act of April 8th, 1873, was enacted, it must be presumed that the Legislature understood the subject upon which they were legislating, and the construction which had been placed upon the statutes by the courts; and, that, by this amendatory act, the rights and obligations of the parties to promissory notes payable in money at a designated place would be determined and regulated by the rules of the commercial law; and, therefore, that such notes would be in the hands of a *bona fide* indorsee for value, exempt from any infirmity in their origin, which did not render them absolutely void, and would be valid against any defense or equities between the antecedent parties.

As was said in Smyth v. Strader, Perrine & Co., *supra*, in reference to the statute of 1828: "*it will scarcely be contended, that on a note so payable, an off-set could be made against an assignee, unless the note were taken under such circumstances as would authorize an off-set by the rules of the law merchant.*"

The sufficiency and validity of the consideration for the transfer and endorsement of the note to the Bank, must be determined by the rules of the commercial law, as settled and held by the Courts of the United States.—Swift v. Tyson, 16 Pet. 1.

It having been shown that the note sued upon is governed by the commercial law, and that the rights of the parties are to be determined by its rules, the next question is, whether, upon the facts, the bank is a *bona fide* purchaser for value? The consideration of the transfer and indorsement to the Bank of the note sued upon, was the extension of a past indebtedness for thirty, sixty, ninety, and one hundred and twenty days, and, in addition thereto, the release of forty-six bales of cotton, which the Bank held as collateral security for a part of this indebtedness. This indebtedness consisted of several different acceptances and cotton bills, but the proposition of the company was to extend the whole indebtedness, and constituted one and entire proposition. This proposition

was accepted by the bank, upon condition, that certain specified collaterals were deposited.—(Page 10, of transcript of record.)

Upon this extension, new acceptances and bills were given for the extended indebtedness, styled in the bill of exceptions, "the extension bills or paper." When the indebtedness was thus extended, these "extension bills or paper," were given in payment of the prior indebtedness, and the times of payment were extended and definitely fixed by the agreement and the terms of the new bills. The delay secured by this arrangement was the principal, and, in fact, only inducement to the transfer and endorsement of the note sued upon, and its deposit with the other collaterals. "Such a suspension of an existing demand, is frequently of the utmost importance to a debtor, and it constitutes one of the oldest titles of the law under the head of forbearance, and has always been considered a sufficient and valid consideration." It seems now to be agreed, that if there was a present consideration at the time of the transfer, independent of the previous indebtedness, that a party acquiring a negotiable instrument, before its maturity, as a collateral security to a pre-existing debt, without knowledge of the facts, which impeach the title as between the antecedent parties, thereby becomes a holder in the usual course of business, and, that his title is complete, so that it will be unaffected by any prior equities between other parties, at least to the extent of the previous debt, for which it is held as collateral.

Goodman v. Simonds, 20 How. (U. S.) 343, 370.

Swift v. Tyson, 16 Peters, 1.

The sufficiency and validity of the consideration, for which the note was transferred and endorsed to the Bank, does not seem to be seriously controverted, and was not questioned in any of the charges, requested by the plaintiff in error; but, he does contend, that forasmuch as the Bank was paid more than the legal rate of interest, upon the extension of the indebtedness, it can not be considered a *bona fide* holder. The case mainly relied upon to sustain this proposition, is

Saltmarsh v. Tuthill, 13 Ala. R., in which it was held, under the statute of Alabama, that a party who became the proprietor of a negotiable instrument, upon a usurious loan of money, is not a *bona fide* holder, in the usual course of trade. In that case the bill sued upon was a renewal of a previous bill, which was passed to the plaintiff in consideration of a direct loan of money, at more than the legal rate of interest, by Tuthill, to the party for whose accommodation the bill was drawn and indorsed. In the opinion delivered, stress is laid upon the fact, that the statute declared the contract, as well as the securities, void and of no effect, for the whole interest. The learned justice who delivered the opinion, evidently based his conclusions upon the principle that no rights can be acquired under or by a void contract, and all the authorities cited by him are decisions upon statutes which declared *the entire contract void.*

The decision in Saltmarsh v. Tuthill, is not binding upon this court upon a question involving the validity of a contract of a commercial nature, which is regulated by an act of Congress, although such contract may have been made in the State of Alabama.—(Swift v. Tyson, 16 Peters, *supra.*) It is entitled to receive such weight and consideration as the soundness of its reasoning and the correctness of its application of legal principles justify, and no more; and is upon a statute which differs, in some respects, from the act of Congress regulating national banks.

The material inquiry is, what is the effect of the act of Congress upon contracts, when a greater rate of interest than is allowed by the law has been actually *paid* to a national bank? It is unnecessary to quote that portion of the act which prescribes the consequences of "taking, receiving, reserving or charging" a higher rate of interest than is authorized by the statute, this Court being familiar therewith. It is sufficient to state, that the statute contains no words which declare that the contract, or bill, note or other evidence of debt shall be void, to any extent whatever, when the usurious interest *has been paid.*

In Harris v. Runnells, 12 How. (U. S.) 79, 84, after recog-

nizing the general rule, that a contract in violation of the provisions of a statute, which, impliedly by affixing a penalty, or expressly, prohibits or enjoins an act, is void, it was said: "In other words, whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, that it is not to be taken for granted that the legislature meant that contracts in contravention of it, were to be void, in the sense that they were not to be enforced in a court of justice In this way, the principle of the rule is admitted, without at all lessening its force, though its absolute and unconditional application to every case is denied. *** That legislators do not think the rule one of universal obligation, or that upon grounds of public policy, it should always be applied, is very certain. For, in some statutes, it is said in terms, that such contracts are void; in others, that they are not so. In one statute, there is no prohibition, and only a penalty; in another there is prohibition and penalty, in some of which contracts in violation of them are void or not, according to the subject matter and object of the statute; and there are other statutes, in which there are penalties and prohibitions in which contracts made in contravention of them will not be void unless one of the parties to them practices a fraud upon the ignorance of the other. It must be obvious, from such diversities of legislation, that statutes forbidding or enjoining things to be done, with penalties accordingly, should always be fully examined, before courts should refuse to give aid to enforce contracts which are said to be in contravention of them."

Construed by this rule, a contract, in which usurious interest is *paid* to a National Bank, is not void, and not tainted with illegality. It must be observed that the act of congress contains no prohibition, but prescribes, "in case a greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided, such action is commenced within two years from the time the usurios transaction occurred."

This statute has been construed by this court in Barnet v. National Bank, 98, U. S. 555, in which it was held that the party aggrieved, or his legal representative, must resort to the remedy given by the statute. "He can have redress in no other mode or form of procedure. The statute which gives the right prescribes the redress, and both provisions are alike obligatory upon the parties." Hence, it was held that the payment of usurious interest can not be applied by way of set-off or payment to the bill of exchange in suit. It follows from this, that, in such case, the Bank is entitled to recover the principal and legal interest from the maturity of the bill. This cannot be done if the contract is illegal.

The subject matter and object of the National Banking Act was the organization and regulation of associations which were designed to aid the government in this particular branch of the public service: and Congress, actuated by a spirit in accord with the advance and progress of commercial transactions and requirements, did not intend to embarrass the banks by stringent laws against usury. Even in the case of usurious interest reserved or charged, but not paid, the contract is void only as to the excess: for, "where a statute prescribes a rate of interest, and simply forbids the taking of more, and more is contracted for, the contract is good for what might be lawfully taken and void only as to the excess." Farmer's, etc., National Bank v. Dearing, 91, U. S. 29. But, when the usurious interest has been *paid*, the contract, bill, note, or other evidence of debt is not void as to any part thereof.

This same principle was long since recognized and held by this court. In De Wolf v. Johnson, 10 Wheat., 367-392, it was said: "that a court of equity will not lend its aid to an illegal or unconscionable bargain is true. But the argument carries this principle too far as applied to this case. The law of Rhode Island certainly forbids the contract of loan for a greater interest than six per cent., and so far no court would lend its aid to recover such interest. But the law goes no farther; it does not forbid the contract of loan, nor preclude the recovery of the principal under any circum-

stances. The sanctions of that law are the loss of the interest and a penalty to the amount of the whole interest and one-third of the principal, if sued for within a year. On what principle could this court add another to the penalties declared by the law itself."

In this case the transaction in question originated in a loan made by DeWolf to one Prentiss in the State of Rhode Island, in the year 1815, the repayment of which was secured by a mortgage upon lands in Kentucky. This contract was afterwards waived by the parties, and a new contract entered into by them in the State of Kentucky in the year 1817.

One of the defenses set up rested upon the assumption that the whole contract of 1815, made in Rhode Island, was void, and could therefore form no basis or consideration for the coatract of 1817, made in Kentucky: and, also, that the contract of 1815, being prohibited by law, although not avoided by law, the court will refuse its aid to enforce it. This defense presented the question of the effect upon a contract of a statute which prohibited the taking of more than a specified rate of interest, and prescribed a specified penalty, but did not avoid the whole contract.

In Gaither v. the Farmers and Mechanic's Bank of Georgetown, 1 Pet. 37, the question was the right of an endorsee of a promissory note of a third person, endorsed to secure collaterally an usurious loan, to sustain an action upon it. The case was governed by the laws of Maryland which declared "all bonds, contracts, and assurances whatever, taken on an usurious contract," *to be utterly void*. It was said: "it follows that the indorsement was a void act, and the property, and of consequence the right of action never passed to these plaintiffs." The same justice who delivered the opinion in the case of De Wolf v. Johnson, *supra*, delivered the opinion in this case, and a comparison of the two opinions shows with what clearness and discrimination he drew the distinction as to the effect upon a contract, between a statute which declared the contract utterly void, and a statute which

declared a forfeiture of the interest only, and prescribed a specific penalty, but left the principal sum recoverable.

The converse of the principle held in the case from 1 Pet. above cited, has been asserted and maintained in numerous decisions, viz: that an endorsee, who has discounted the note of a third person at an usurious rate, if the statute does not declare the whole contract void, is entitled to recover against the maker both principal and lawful interest.

The payment of usurious interest to the Bank, in the case under consideration, did not form, or constitute, any part of the consideration for which the note sued upon was transferred and endorsed to the Bank. The sole and entire consideration for the transfer and endorsement of the note was the extension of the indebtedness of the Tallassee Manufacturing Company to the Bank, for specified times and upon specified terms, as shown by the agreement entered on the minute-book of the Bank. The transaction, therefore, must rest upon the principle, that when some of the promises only are illegal, the illegality of these does not communicate itself to, or taint the others, except when, owing to some peculiarity in the contract, its parts are inseparable. In the arrangement and transaction between the Company and the Bank, the parts are separable of themselves, and, if not, have been made separable by the act of Congress. The *payment* of the usurious interest in advance by the statute has been made separable from the contract for the extension of the indebtedness upon depositing collateral security therefor. The former is separated from the latter, so far, that it cannot be set up by way of set-off, or payment, to the bill, note, or other evidence of debt, if sued upon. It is entirely disconnected therefrom by the act, and a separate and distinct action—the mode prescribed by the act—must be brought to recover the penalty; and this action can only be brought by the *person paying the same, or his legal representatives*, and if not brought within two years, no penalty can be recovered. On the other hand, the agreement by the Bank to extend the indebtedness for definite periods of time, upon a sufficient consideration, was a valid contract, and binding upon

the Bank, notwithstanding usurious interest was paid in advance. The transfer and endorsement of the note sued upon, and the deposit of the other collateral securities, without the release of any of the cotton held by the Bank at the time of the extension as collateral security, was sufficient consideration. The Bank was thereby prevented from instituting suit upon the indebtedness until the "extension bills or paper" matured, and the Company acquired a right to the forbearance granted by such agreement. If the contract was void or illegal, no rights could be acquired thereunder by either party; the Bank would not have been debarred from sueing, and the Company would not have been entitled to any forbearance; upon the same principle, that, if a creditor agrees with his principal debtor to extend the time of payment by a contract, which is void by the statute of frauds, or illegal or void from any cause, a surety is not thereby discharged.

If it be true that the parties did acquire rights under the contract of extension, as above mentioned, these rights must rest upon the ground that the contract was a valid and lawful contract, or, in other words, that the deposit of the collateral security, formed a sufficient basis or consideration for the agreement of the bank to extend, and the agreement of the bank to extend formed a sufficient basis or consideration for the transfer and endorsement of the note sued upon.

If what has been said above is correct, it logically follows that the bank became the indorsee and holder of the note for what the law deems a good and valid consideration, in the usual course of business, and is thus a *bona fide* holder; otherwise, a penalty, other and additional to that affixed by the statute, is imposed upon the bank: that is, a forfeiture of the right to be considered and held a *bona fide* purchaser of the note under the same circumstances and upon the same consideration which otherwise would have constituted it in law such purchaser. As was asked in De Wolf v. Johnson, "on what principle could this court add another to the penalties declared by the law itself?"

The bill of exceptions shows that the bank was without

notice of any infirmity in the origin of the note, or of any defense or equities existing between the antecedent parties; and the circuit court did not err upon the points of law above discussed, being the first and second points stated, either in the charges given or the refusals to charge, as requested by the plaintiff in error.

The charge which raised the third point of law, above stated, was requested by the plaintiff in error, and was refused by the court, and was as follows: "That if the officers of the Bank, at the time it traded for the note, had notice of such facts and circumstances as would have induced a prudent man to make further inquiry, will authorize the jury to impute to the Bank notice of all that it could have ascertained by due inquiry, and, if the officers of the Bank refrained from making inquiry, with the view of avoiding knowledge, then such failure would be evidence of bad faith."

This charge asserted two distinct legal propositions; first, that notice of such facts and circumstances as would have induced a prudent man to make further inquiry is sufficient to charge the Bank with all that it could have ascertained by making such inquiry; and, second, that refraining from making inquiry, with the view of avoiding knowledge, is evidence of bad faith.

The first legal proposition asserted in the charge, is in direct conflict with the principle that "suspicion of defect of title, or the knowledge of circumstances which would excite suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title; that result can be produced only by bad faith on his part."

Murray v. Lardner, 2 Wall, 110, 121.

Hotchkiss v. National Banks, 21 Wall, 354, 359.

Commissioners v. Clark, 94 U. S. 278, 285.

The second legal proposition asserted in the charge, even if abstractly correct, which is not admitted, was not based

upon or authorized by any evidence in the case. There was no evidence tending to show that the officers of the Bank refrained from inquiry with the view of avoiding knowledge. The charge was abstract, and for that reason, if for no other, should have been refused. A charge, not asserting a correct legal proposition, as applied to the evidence, should be refused.

Martin v. Hill, 42 Ala. 275.
Railroad Co. v. Houston, 95 U. S. 697.
Ins. Co. v. Baring, 20 Wal. 159.

A charge, based partly or entirely on a state of facts of which there does not appear to have been any evidence, is abstract, and should, for that reason, be refused.

Knox v. Easton, 38 Ala. 345.

A charge requested, asserting two distinct legal propositions, one of which is erroneous, may be refused entirely.

Slater v. Carter, 35 Ala. 679.
Beaver v. Taylor, 93 U. S. 46.

The charge certainly asserts one erroneous legal proposition, and was calculated to mislead the jury.

There was no evidence whether or not the Tallassee Manufacturing Company was a corporation. But whether a corporation or not, it possessed the power to sell its stock for cash or on a credit, unless, if a corporation, there is some limitation upon this power in its charter or the law; for, without any prohibition, a corporation has power to make all contracts and do all acts necessary to the accomplishment of the purposes of its creation. If any such limitation or prohibition existed in the charter, it was incumbent upon the plaintiff in error to show it, and the burden was not upon the bank to show the existence of such power in the corporation. Further, if the contract for the sale of the stock to the plaintiff in error was *ultra vires*, this illegality will not avoid the note in the hands of a *bona fide* holder without notice; for the rule is, that if a corporation have

the power to take the note for any purpose, a note originally given to them would be valid in the hands of a *bona fide* holder without notice, though the corporation might not have had the power to take the particular note.

Angell & Ames on Corporations, section 268.

Railway Co. v. McCarthy, 96 U. S. 266.

Commissioners v. Boles, 94 U. S. 104.

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